No. 15-423
Vide 15-698

Title:	Bolivarian Republic of Venezuela, et al., Petitioners v. Helmerich & Payne International Drilling Co., et al.
Docketed:	October 6, 2015
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Nos.:	(13-7169, 13-7170, 14-7008)
Decision Date:	May 1, 2015
Rehearing Denied:	July 30, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Oct 5 2015	Petition for a writ of certiorari filed. (Response due November 5, 2015)
Oct 27 2015	Order extending time to file response to petition to and including December 7, 2015.
Dec 3 2015	Order further extending time to file response to petition to and including January 6, 2016.
Jan 6 2016	Brief of respondents Helmerich & Payne International Drilling Co., et al. in opposition filed.
Jan 19 2016	Reply of petitioners Bolivarian Republic of Venezuela, et al. filed.
Jan 20 2016	DISTRIBUTED for Conference of February 19, 2016.
Feb 29 2016	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 24 2016	Brief amicus curiae of United States filed.
Jun 6 2016	Supplemental brief of respondents Helmerich & Payne International Drilling Co., et al. filed.
Jun 7 2016	DISTRIBUTED for Conference of June 23, 2016.
Jun 27 2016	DISTRIBUTED for Conference of June 27, 2016.
Jun 28 2016	Petition GRANTED limited to Question 3 presented by the petition.
Jul 21 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 28 2016	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 19, 2016.
Jul 29 2016	The time to file respondents' brief on the merits is extended to and including September 26, 2016.
Aug 19 2016	Joint appendix filed. (Statement of costs filed)
Aug 19 2016	Brief of petitioners Bolivarian Republic of Venezuela, et al. filed.
Aug 26 2016	Brief amicus curiae of United States filed.
Sep 2 2016	SET FOR ARGUMENT On Wednesday, November 2, 2016
Sep 9 2016	Record has been requested from the U.S.C.A. District of Columbia Circuit.
Sep 23 2016	Record received from U.S.C.A. District of Columbia Circuit. The record is electronic and located on PACER, with the exception of an electronic copy of the transcript of the oral argument.

Sep 23 2016	Record received from the U.S.D.C. District of Columbia is electronic and located on PACER.
Sep 26 2016	Brief of respondents Helmerich & Payne International Drilling Co., et al. filed.
Sep 28 2016	CIRCULATED
Sep 29 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 3 2016	Brief amici curiae of Former State Department Attorneys John Norton Moore and Edwin D. Williamson filed. (Distributed)
Oct 17 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 21 2016	Reply of petitioners Bolivarian Republic of Venezuela, et al. filed. (Distributed)
Nov 2 2016	Argued. For petitioners: Catherine E. Stetson, Washington, D. C.; and Elaine J. Goldenberg, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Catherine M.A. Carroll, Washington, D. C.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~~Address~~~~~~~~~~~~~~~~~~~~	~~Phone~~~~
Attorneys for Petitioners:		
Bruce D. Oakley Counsel of Record	700 Louisiana Street Suite 4300 Houston, TX 77002 bruce.oakley@hoganlovells.com	(713) 632-1400
Party name: Bolivarian Republic of Venezuela, et al.		
Catherine E. Stetson	Hogan Lovells US LLP 555 Thirteenth Street, N.W. Washington, DC 20004 cate.stetson@hoganlovells.com	(202) 637-5491
Party name: Bolivarian Republic of Venezuela, et al.		
Attorneys for Respondents:		
David W. Ogden Counsel of Record	Wilmer Cutler Pickering Hale and Dorr LLP 1875 Pennsylvania Ave., NW Washington, DC 20006 david.ogden@wilmerhale.com	(202) 663-6440
Party name: Helmerich & Payne International Drilling Co., et al.		
Catherine M.A. Carroll	Wilmer Cutler Pickering Hale and Dorr LLP 1875 Pennsylvania Avenue, NW Washington, DC 20006 catherine.carroll@wilmerhale.com	(202) 663-6072
Party name: Helmerich & Payne International Drilling Co., et al.		
Other:		
Elaine J. Goldenberg	Assistant to the Solicitor General Department of Justice Washington, DC 20530	

Party name: United States

Michael J. Gottlieb — Boies, Schiller & Flexner LLP — (202) 237-2727
5301 Wisconsin Ave., N.W.
Washington, DC 20015
mgottlieb@bsfllp.com

Party name: Former State Department Attorneys John Norton Moore and Edwin D. Williamson

Jeffrey B. Wall — Acting Solicitor General — (202) 514-2217
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
SupremeCtBriefs@USDOJ.gov

Party name: United States

Supreme Court, U.S.
FILED
OCT - 5 2015
OFFICE OF THE CLERK

15-423
No. 15-

IN THE
Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

JOSEPH D. PIZZURRO
ROBERT B. GARCÍA
101 Park Avenue
New York, NY 10178

HOGAN LOVELLS US LLP

BRUCE D. OAKLEY
Counsel of Record
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

WILLIAM L. MONTS, III
MARY HELEN WIMBERLY
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (FSIA) provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter" 28 U.S.C. § 1604. Under the Act's expropriation exception, in pertinent part, "[a] foreign state shall not be immune * * * in any case * * * in which rights in property taken in violation of international law are in issue." *Id.* § 1605(a)(3).

The three questions presented in this petition concern the requirements for pleading jurisdiction under the expropriation exception. They are:

1. Whether, for purposes of determining if a plaintiff has pleaded that a foreign state has taken property "in violation of international law," the FSIA recognizes a discrimination exception to the domestic-takings rule, which holds that a foreign sovereign's taking of the property of its own national is not a violation of international law.

2. Whether, for purposes of determining if a plaintiff has pleaded that "rights in property taken in violation of international law are in issue," the FSIA allows a shareholder to claim property rights in the assets of a still-existing corporation.

3. Whether the pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.

PARTIES TO THE PROCEEDINGS

1. Bolivarian Republic of Venezuela, Petróleos de Venezuela, S.A., and PDVSA Petróleo, S.A., petitioners on review, were defendants-appellants and cross-appellees below.

2. Helmerich & Payne International Drilling Co., respondent on review, was plaintiff-appellee below. Helmerich & Payne de Venezuela, C.A., respondent on review, was plaintiff-appellee and cross-appellant below.

RULE 29.6 DISCLOSURE STATEMENT

Bolivarian Republic of Venezuela is a sovereign state and is not a corporation.

Petróleos de Venezuela, S.A., is a corporation organized under the laws of Venezuela. It is wholly owned by the Bolivarian Republic of Venezuela. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

PDVSA Petróleo, S.A., is a corporation organized under the laws of Venezuela. Petróleos de Venezuela, S.A. owns all of the outstanding stock of PDVSA Petróleo, S.A., and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT 5

A. Factual Background 5

B. Procedural History 6

REASONS FOR GRANTING THE PETITION 11

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT, AND DEPARTS FROM THIS COURT'S PRECEDENTS, ON IMPORTANT QUESTIONS OF FEDERAL LAW 11

A. The D.C. Circuit's Recognition Of A Discrimination Exception To The Domestic-Takings Rule Creates A Circuit Split 11

B. The Lower Court's Rejection Of Traditional Corporate Law Principles Under The FSIA Is Contrary To This Court's Precedent 18

TABLE OF CONTENTS—Continued

Page

C. The Courts Of Appeals Are Divided Over Whether The "Wholly Insubstantial Or Frivolous" Standard For Federal-Question Jurisdiction Applies To FSIA Jurisdictional Dismissal Analysis 26

II. THE D.C. CIRCUIT'S DECISION IMPLICATES VITALLY IMPORTANT QUESTIONS OF FOREIGN-SOVEREIGN IMMUNITY UNDER FEDERAL LAW 33

CONCLUSION 36

APPENDICES

APPENDIX A—Court of Appeals' Opinions (May 1, 2015) 1a

APPENDIX B—District Court's Memorandum Opinion (Sept. 20, 2013) 37a

APPENDIX C—District Court's Order (Jan. 6, 2014) 92a

APPENDIX D—Court of Appeals' Order Denying Panel Rehearing (July 30, 2015) 95a

APPENDIX E—Court of Appeals' Order Denying Rehearing En Banc (July 30, 2015) 97a

APPENDIX F—Statutory Provisions Involved 99a

TABLE OF AUTHORITIES

Page(s)

CASES:

Abelesz v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012) 12, 13, 28, 29

Agudas Chasidei Chabad of U.S. v. *Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) 30

Anderson v. *Cox*, 503 F App'x 495 (9th Cir. 2012) 22

Arbaugh v. *Y & H Corp.*, 546 U.S. 500 (2006) 30, 32

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 2

Banco Nacional de Cuba v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962) 8, 10, 15, 16, 17

Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belgium v. *Spain)*, 1970 I.C.J. 3 (Feb. 5, 1970) 16, 24

Bell v. *Hood*, 327 U.S. 678 (1946) 26, 30, 32

Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007) 29

Best Med. Belgium, Inc. v. *Kingdom of Belgium*, 913 F Supp. 2d 230 (E.D. Va. 2012) 34

Broad v *Sealaska Corp.*, 85 F.3d 422 (9th Cir. 1996) 22

Byers v *United States*, 4 F. App'x 763 (Fed. Cir. 2001) 22

Cassirer v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) 30-31

TABLE OF AUTHORITIES—Continued

Page(s)

Chettri v. *Nepal Bangladesh Bank, Ltd.*, No. 10 CIV 8470 PGG, 2014 WL 4354668 (S.D.N.Y. Sept. 2, 2014) 34

Chuidian v. *Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990) 14

Community Fin. Grp., Inc. v. *Republic of Kenya*, 663 F.3d 977 (8th Cir. 2011) 29

de Csepel v. *Republic of Hungary*, 75 F. Supp. 3d 380 (D.D.C. 2014) 34

Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 9, 10, 19, 20, 21, 33

Duncan v. *Peninger*, 624 F.2d 486 (4th Cir. 1980) 22

Eliahu v. *Israel*, No. 14-CV-01636-BLF, 2015 WL 981517 (N.D. Cal. Mar. 3, 2015) 34

EM Ltd. v. *Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007) 20

Ezeiruaku v. *Bull*, No. CIV.A. 14-2567 JBS, 2014 WL 5587404 (D.N.J. Nov. 3, 2014) 34

First Nat'l City Bank v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 16-17

Fischer v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015) 12, 13, 14

Franchise Tax Bd. of Cal. v *Alcan Aluminum Ltd.*, 493 U.S. 331 (1990) 21

TABLE OF AUTHORITIES—Continued

Page(s)

Freund v. *Societe Nationale des Chemins de fer Francais*, 391 F. App'x 939 (2d Cir. 2010) 27

Geon v *Republic of Korea*, No. 13-CV-13251-DJC, 2015 WL 2376059 (D. Mass. May 18, 2015) 34

Goar v *Compania Peruana de Vapores*, 688 F.2d 417 (5th Cir. 1982) 35

Hastings v. *Wilson*, 516 F.3d 1055 (8th Cir. 2008) 29

Hausman v. *Buckley*, 299 F.2d 696 (2d Cir. 1962) 24

LaLoup v. *United States*, 29 F Supp. 3d 530 (E.D. Pa. 2014) 34

Los Angeles Cnty. v. *Davis*, 440 U.S. 625 (1979) 25

Mezerhane v. *Republica Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015) ... 29, 31

Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. *Elahi*, 546 U.S. 450 (2006) 33

Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. *Elahi*, 556 U.S. 366 (2009) 33

Mohamad v. *Palestinian Auth.*, 132 S. Ct. 1702 (2012) 33

Montez v. *Department of Navy*, 392 F.3d 147 (5th Cir. 2004) 28, 32

TABLE OF AUTHORITIES—Continued

Page(s)

Moran v. *Kingdom of Saudi Arabia*,
27 F.3d 169 (5th Cir. 1994) 28

New Orleans Debenture Redemption Co. of Louisiana v *Louisiana*,
180 U.S. 320 (1901) 22

OBB Personenverkehr AG v. *Sachs*,
135 S. Ct. 1172 (2015) 4, 33, 34

Orkin v. *Swiss Confederation*,
444 F. App'x 469 (2d Cir. 2011) 27

Osborn v. *United States*,
918 F.2d 724 (8th Cir. 1990) 29

Permanent Mission of India to the United Nations v. *City of New York*,
551 U.S. 193 (2007) 8, 9, 16, 22, 23, 24, 33

Powerex Corp. v. *Reliant Energy Servs., Inc.*,
551 U.S. 224 (2007) 33

Ramirez de Arellano v. *Weinberger*,
745 F.2d 1500 (D.C. Cir. 1984) 9, 10, 19, 25

Republic of Argentina v. *NML Capital, Ltd.*,
134 S. Ct. 2250 (2014) 33

Republic of Austria v. *Altmann*,
541 U.S. 677 (2004) 33

Republic of Iraq v. *Beaty*,
556 U.S. 848 (2009) 8, 33

Republic of Philippines v. *Pimentel*,
553 U.S. 851 (2008) 33

Rhuma v. *State of Libya*,
No. 2:13-CV-2286 MCEACPS, 2014 WL 5486604 (E.D. Cal. Oct. 29, 2014) 34

TABLE OF AUTHORITIES—Continued

Page(s)

Robinson v *Government of Malaysia*,
269 F.3d 133 (2d Cir. 2001) 27, 28, 32

Samantar v. *Yousuf*,
560 U.S. 305 (2010) 33

Sanchez-Llamas v. *Oregon*,
548 U.S. 331 (2006) 17

Saudi Arabia v. *Nelson*,
507 U.S. 349 (1993) 31

Segni v. *Commercial Office of Spain*,
816 F.2d 344 (7th Cir.1987) 27, 32

Siderman de Blake v. *Republic of Argentina*,
965 F.2d 699 (9th Cir. 1992) 14, 30

S.K. Innovation, Inc. v. *Finpol*,
854 F. Supp. 2d 99 (D.D.C. 2012) 34

Smith Rocke Ltd. v. *Republica Bolivariana de Venezuela*, No. 12 CV 7316 LGS, 2014 WL 288705 (S.D.N.Y. Jan. 27, 2014) 34

Sosa v. *Alvarez-Machain*,
542 U.S. 692 (2004) 16, 26

United States v. *Acadiana Treatment Sys. Inc.*,
2000 WL 634145 (5th Cir. 2000) 22

United States v. *Bennett*,
621 F.3d 1131 (9th Cir. 2010) 20

United States v. *Texas*,
507 U.S. 529 (1993) 20

Universal Trading & Inv. Co. v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*,
898 F Supp. 2d 301 (D. Mass. 2012) 34

TABLE OF AUTHORITIES—Continued

Page(s)

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 4, 34

West v. *Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1986) 30

Zappia Middle E. Const. Co. v. *Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000) 27, 28

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 32

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611 2

28 U.S.C. § 1391(f)(4) 33

28 U.S.C. § 1603(a) 6

28 U.S.C. § 1603(b) 6, 19, 20

28 U.S.C. § 1603(b)(2) 19

28 U.S.C. § 1605(a)(2) 6

28 U.S.C. § 1605(a)(3) ..... *passim*

28 U.S.C. § 1605(a)(4) 23

28 U.S.C. § 1605(a)(5) 18

RULES:

Fed. R. Civ. P 11 31

Fed. R. Civ. P 12(b)(1) 4, 26, 27, 28, 29, 30

Fed. R. Civ. P 12(b)(6) 26, 29

Fed. R. Civ P 54(b) 8

S. Ct. R. 10 11

TABLE OF AUTHORITIES—Continued

Page(s)

LEGISLATIVE MATERIAL:

H.R. Rep. No. 94-1487 (Sept. 9, 1976) 4, 34, 35

OTHER AUTHORITIES:

18A Am. Jur. 2d Corporations § 623 (2015) 19

Restatement (Third) of the Foreign Relations Law of the United States § 712 (1987) 11, 12, 13, 14, 15

Submission of the United States, *International Thunderbird Gaming Corp.* v *United Mexican States*, UNCITRAL Case (May 21, 2004), *available at* http://www.state.gov/documents/organization/32819.pdf 16, 24

IN THE

Supreme Court of the United States

No. 15-

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Bolivarian Republic of Venezuela, Petróleos de Venezuela, S.A., and PDVSA Petróleo, S.A., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The court of appeals' decision is reported at 784 F.3d 804 and reproduced in the appendix to this petition at Pet. App. 1a-36a. The district court's order is reported at 971 F. Supp. 2d 49 and reproduced at Pet. App. 37a-91a.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2015, and a timely petition for panel rehearing and rehearing en banc was denied on July 30, 2015. Pet. App. 95a-98a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611. Relevant provisions of the Act are reproduced in the appendix. Pet. App. 99a-105a.

INTRODUCTION

This case presents important questions concerning the FSIA, "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). It concerns the Act's "expropriation exception" to foreign-sovereign immunity for cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3).

The parties' dispute arises out of the nationalization of oil rigs and related property in Venezuela. Both the Venezuelan corporation that formerly owned the property and its American parent corporation sued the Republic of Venezuela and its wholly owned oil companies in federal court, alleging jurisdiction under the FSIA. They claimed that the property was taken in violation of international law and therefore the case fell within the FSIA's expropriation exception. In a split decision, two D.C. Circuit judges held that the plaintiffs could pursue their takings claim because they had pleaded facts falling

within the expropriation exception. Judge Sentelle dissented, concluding that their claim fell outside of that exception as a matter of law

This petition presents three questions concerning the requirements for pleading jurisdiction under the expropriation exception. The first question asks what must be pleaded to claim that the property at issue was "taken in violation of international law." One of the tenets of international law is that a foreign sovereign's taking of its own national's property is a matter of domestic—but not international—concern. This is known as the domestic-takings rule. The D.C. Circuit adopted an exception to this rule, holding that it does not apply where the taking is motivated by discrimination. Its decision breaks from the contrary rulings of the Seventh and Ninth Circuits, which do not recognize a discrimination exception to the domestic-takings rule under the FSIA.

The second question asks what the FSIA requires for a corporate plaintiff to plead that its "rights in property" were "taken in violation of international law " The court below rejected the traditional corporate-law principles that draw a bright line between a parent corporation's property rights in the subsidiary corporate entity, and the subsidiary's property rights in its assets. It held that a parent corporation could sue alongside its subsidiary for the exact same recovery, based on the exact same taking, of the exact same corporate property. The decision conflicts with this Court's holdings that the FSIA incorporates traditional corporate-law principles, as well as international law at the time of the FSIA's enactment.

The third and final question concerns the general standard for reviewing jurisdictional pleadings under

the expropriation exception. The courts of appeals are divided on this question 4-to-2. The Second, Seventh, Eighth, and Eleventh Circuits will dismiss an expropriation-exception claim if it fails to meet the usual standards for facial and factual jurisdictional attacks under Fed. R. Civ. P. 12(b)(1). They do so even when the jurisdictional and merits inquiries overlap, recognizing that foreign sovereigns enjoy immunity not only from liability, but from the burdens of litigation. The D.C. and Ninth Circuits, by contrast, will dismiss such a claim on jurisdictional grounds only if it is wholly insubstantial and frivolous, offering little protection for a foreign state's sovereignty at the pleading stage.

All three questions presented are important. They reflect deep divisions among the federal courts of appeals, and tension between the decision below and this Court's case law, concerning the immunity protections afforded foreign sovereigns under the FSIA. This conflict is intolerable under the FSIA, the very purpose of which is to ensure "'a uniform body of law in this area'" "'in view of the potential sensitivity of actions against foreign states.'" *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (brackets removed) (quoting H.R. Rep. No. 94-1487, at 32 (Sept. 9, 1976)). *See generally OBB Personenverkehr AG* v. *Sachs*, 135 S. Ct. 1172 (Jan. 23, 2015) (granting certiorari) (presenting analogous questions under the FSIA's commercial-activities exception).

The petition therefore should be granted.[1]

---

[1] Because of the important foreign-policy issues at stake, the Court may wish to call for the views of the Solicitor General.

STATEMENT

A. Factual Background

The plaintiffs in this lawsuit are Helmerich & Payne de Venezuela, C.A. (H&P-V), and Helmerich & Payne International Drilling Co. (H&P-IDC) (collectively, the H&P plaintiffs). The defendants are the Bolivarian Republic of Venezuela (the Republic), Petróleos de Venezuela, S.A. (PDVSA), and PDVSA Petróleo, S.A. (Petróleo) (collectively, Venezuela).

The H&P plaintiffs allege that in 2010, Venezuela expropriated eleven oil drilling rigs and related property owned by H&P-V, a Venezuelan corporation. C.A. J.A. 29-35 (Compl. ¶¶ 59-85). H&P-V is a wholly owned subsidiary of H&P-IDC, an American corporation. C.A. J.A. 16-17 (¶¶ 9-10).

H&P-V began performing drilling services for PDVSA and Petróleo in the 1970s and continued to do so until the relationship deteriorated six years ago. C.A. J.A. 19, 24, 27-28 (¶¶ 16, 34, 50-52). Following a contractual dispute with Petróleo, Helmerich & Payne, Inc. announced that H&P-V would cease drilling operations in Venezuela. C.A. J.A. 27 (¶ 50). In June 2010, the Venezuelan National Assembly published a Bill of Agreement declaring that H&P-V's oil rigs and associated property were of "public utility and social interest," and recommending that the National Executive expropriate such property. C.A. J.A. 97 (Bill of Agreement). The National Executive did so that same day C.A. J.A. 104-107 (Decree of Expropriation). Expropriation proceedings commenced in July 2010 to effectuate transfer of title, determine the fair value of the assets to be expropriated, and provide compensation to all interested parties. C.A. J.A. 32, 35 (Compl.

¶¶ 72-73, 86-88); C.A. J.A. 107 (Decree of Expropriation art. 4). These proceedings are ongoing, and H&P-V has appeared in both. C.A. J.A. 32 (Compl. ¶¶ 72-73); Defs.-Appellants' C.A. Opening Br. 10.

B. Procedural History

1. In September 2011, the H&P plaintiffs sued Venezuela in the U.S. District Court for the District of Columbia, alleging jurisdiction under the FSIA, and asserting two claims for damages. C.A. J.A. 11-68 (Compl.). First, they brought a joint claim against the Republic, PDVSA, and Petróleo for a taking in violation of international law. C.A. J.A. 55-56 (¶¶ 172-181). The H&P plaintiffs sought undifferentiated relief for this takings claim. *See id.* Second, H&P-V asserted claims against PDVSA and Petróleo based on their contractual dispute. C.A. J.A. 56-66 (¶¶ 182-281).

The H&P plaintiffs pleaded their claims under the FSIA because the Republic is a "foreign state" under 28 U.S.C. § 1603(a), and PDVSA and Petróleo are each an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b). C.A. J.A. 17-18 (¶¶ 11-13). Accordingly, the District Court had subject-matter jurisdiction only if one of the FSIA's exceptions to Venezuela's foreign-sovereign immunity applied. For the takings claim, the H&P plaintiffs invoked the expropriation exception, 28 U.S.C. § 1605(a)(3), and for the contract claims, H&P-V cited the commercial-activities exception, *id.* § 1605(a)(2).

2. Venezuela moved to dismiss all claims for lack of subject-matter jurisdiction.[2] The District Court granted the motions in part and denied them in part. Pet. App. 91a.

On the takings claim, the disputed question was whether the H&P plaintiffs had pleaded that their "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). The District Court answered that question differently for each plaintiff. As for H&P-V, the District Court held that H&P-V, as a Venezuelan corporation, is a Venezuelan national. Pet. App. 49a-59a. The expropriation exception therefore did not apply to H&P-V's takings claim because, under the domestic-takings rule, a sovereign's taking of the property of its own national does not violate international law. *Id.*

The District Court reached the opposite conclusion for H&P-IDC's expropriation claim. It held that H&P-IDC as an American parent corporation could claim that its own property was taken in violation of international law—even though the particular property taken belonged to its subsidiary, H&P-V Pet. App. 81a-90a. Specifically, the court ruled that "the complete physical seizure of a parent company's wholly[ ]owned subsidiary, to the point of eliminating the corporation entirely (or comprehensively taking its assets and profits), deprives the parent share-

---

[2] Venezuela also moved to dismiss under the act-of-state doctrine. The District Court refused to dismiss on that basis, ruling that it could not reach a merits defense before resolving all jurisdictional issues. Pet. App. 59a-64a. The D.C. Circuit declined to exercise pendent appellate jurisdiction over the issue. Pet. App. 22a-23a. This petition does not seek review of that ruling.

holder of its 'essential' and unique rights, giving rise to claims that would not belong to the corporation." Pet. App. 89a.

The District Court denied PDVSA and Petróleo's motion to dismiss the contract claims, holding that, although the alleged breaches occurred outside the United States, they had a direct effect in the United States and were thus within the court's jurisdiction. Pet. App. 64a-81a.

3. a. Both sides appealed. Venezuela appealed under the collateral-order doctrine. *See, e.g.*, *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 854 (2009); *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007). And H&P-V cross-appealed after the District Court entered partial final judgment against it under Fed. R. Civ. P 54(b). *See* Pet. App. 92a-94a.

b. The D.C. Circuit affirmed in part and reversed in part in a 2-to-1 decision. The majority first held that the District Court erred in dismissing H&P-V's expropriation claim. Relying on the Second Circuit's pre-FSIA decision in *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964), the majority concluded that, because the complaint had alleged that the expropriation of H&P-V's property was motivated by discriminatory animus against the company's American parent (H&P-IDC), the case fell within an exception to the domestic-takings rule. Pet. App. 13a-16a. The majority recognized that *Sabbatino* had never been followed, or applied to the FSIA's jurisdictional provisions, but nonetheless reasoned that, "[d]ated and uncited as it may be, * * * *Sabbatino* remains good law " Pet. App. 15a. It held that under the D.C. Cir-

cuit's "forgiving standard for surviving a motion to dismiss in an FSIA case," that was enough "to meet this exceptionally low bar" where "our circuit has yet to consider this issue." Pet. App. 11a, 15a, 16a.

The majority affirmed the District Court's refusal to dismiss H&P-IDC's claim because H&P-IDC had purportedly pleaded that its own rights in the property of H&P-V were taken in the expropriation. Pet. App. 17a-22a. Venezuela had relied on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), for the proposition that the FSIA incorporates basic principles of corporate law and that, under those principles, a shareholder does not have an independent property interest in the corporate assets. But the majority determined that *Dole Food*'s holding that "[t]he text of the FSIA gives no indication that Congress intended us to depart from the general rules regarding corporate formalities," *id.* at 475-476, was not particularly relevant because it concerned a different provision of the FSIA and did "not represent a wholesale incorporation of corporate law into the FSIA," Pet. App. 18a.

It also read this Court's decision in *Permanent Mission*, 551 U.S. 193, to demonstrate that, irrespective of corporate-ownership principles, "rights in property" under the FSIA extend beyond ownership and possession. Pet. App. 19a-22a. And, based on the authority of a vacated, Due Process decision, the majority determined that "shareholders may have rights in corporate property." Pet. App. 20a; *see Ramirez de Arellano* v *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *cert. granted, judgment vacated*, 471 U.S. 1113 (1985). Based on this chain of reasoning, the majority concluded that H&P-IDC, as H&P-V's corporate parent, had (unspecified) property rights in issue, even though it did not own, possess, or have

contractual rights to the oil rigs at the heart of the parties' dispute. Pet. App. 22a.

Finally, the majority reversed the District Court's finding of jurisdiction over the contract claims, holding that the alleged breaches did not cause a direct effect in the United States under the FSIA's commercial-activities exception. Pet. App. 23a-29a. That ruling is not at issue in this petition.

c. Judge Sentelle joined the majority's decision on the contract claims but dissented from its ruling on the expropriation claim. Pet. App. 30a-36a. With respect to H&P-V's claim, he reasoned that "[w]hen appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law. To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate Venezuela's sovereignty, the value protected by the FSIA." Pet. App. 32a-33a. He rejected *Sabbatino* as providing an adequate basis for an exception to the domestic-takings rule and would instead "conclude that Venezuela's reliance on the domestic takings rule is well taken and should compel the dismissal of Helmerich & Payne's expropriation claim for want of jurisdiction." Pet. App. 33a.

As for H&P-IDC's claim, Judge Sentelle concluded that "the majority's apparent belief that Venezuela's reliance upon *Dole Food Co.* *** is misplaced" was without merit because no authority has rejected the application of general corporate-law principles to the FSIA. Pet. App. 33a-34a. He also believed that the vacated *Ramirez* decision was not binding precedent, Pet. App. 34a-36a, and, in any event, *Ramirez* "is not genuinely on point" because it is a Due Process case, Pet. App. 36a.

d. Venezuela petitioned for panel rehearing and rehearing en banc. The panel denied the petition, with Judge Sentelle voting to grant rehearing. Pet. App. 95a-96a. A vote for rehearing en banc was called, but a majority of the active judges declined to rehear the case. Pet. App. 97a-98a.

Venezuela now petitions for this Court's review.

REASONS FOR GRANTING THE PETITION

There are "compelling reasons" for the Court to grant review. S. Ct. R. 10. The three questions presented concern the extent to which private plaintiffs may use U.S. courts to challenge the actions of a foreign sovereign state in its own territory. The decision below generously allows such plaintiffs to sue foreign states on legal theories that are unrecognized by international law, so long as they plead facts suggesting their international takings claims are not wholly insubstantial and frivolous. This turns the presumptive immunity of foreign states under the FSIA on its head, and has no basis in the text or purpose of the Act. Review should be granted.

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT, AND DEPARTS FROM THIS COURT'S PRECEDENTS, ON IMPORTANT QUESTIONS OF FEDERAL LAW.

A. The D.C. Circuit's Recognition Of A Discrimination Exception To The Domestic-Takings Rule Creates A Circuit Split.

The FSIA's expropriation exception states, in pertinent part, that "[a] foreign state shall not be immune * * * in any case * * * in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). The Restatement

(Third) of the Foreign Relations Law of the United States (1987) (hereinafter, Restatement) explains that a taking violates international law when (a) a sovereign state takes the property *of a national of another state*, and (b) the taking (i) is not for a public purpose; (ii) is discriminatory; or (iii) is not accompanied by provision for just compensation. Restatement § 712.

Under this test, courts apply a two-part analysis. First, courts must determine whether the property was taken from a national of another state. Only if the answer is yes does the court go on to the second step, determining whether the taking falls into one of the prohibited categories. The domestic-takings rule draws its name from precisely that distinction.

The Seventh and Ninth Circuits have correctly followed the Restatement's test, holding that a plaintiff cannot plead a violation of international law under the domestic-takings rule when a foreign state expropriates the property of its own nationals—even if for discriminatory reasons. The court below, however, construed the Restatement to recognize an exception to the domestic-takings rule for discriminatory takings. It held that pleading a foreign state's discriminatory expropriation of the property of its own nationals *does* state a violate international law. In so holding, the court created a 2-to-1 circuit split.

1. a. In two decisions arising from the same litigation, the Seventh Circuit held that there is no discrimination exception to the domestic-takings rule. *See Fischer* v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir.), *cert. denied*, 135 S. Ct. 2817 (2015); *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012). The case was brought by Holocaust sur-

vivors against several Hungarian state entities. The plaintiffs alleged that the defendants expropriated their property during the Holocaust. They argued that they had pleaded a violation of international law, even though they were Hungarian nationals at the time of the expropriation, because "the takings were 'discriminatory.'" *Fischer*, 777 F.3d at 857 [3]

The court rejected that theory, and declined to adopt any type of discrimination-based exception to the domestic-takings rule. *Id.* at 857-858. The plaintiffs' argument, the court reasoned, "misunderstands * * * the nature of 'discrimination' in international expropriation cases," as well as the relevant section (712) of the Restatement. *Fischer*, 777 F.3d at 857 "Section 712 applies, by its terms, only to a state's takings of property of nationals of other states, not to its takings of property from its own nationals, as alleged in these cases." *Id.* "The discrimination that concerns § 712 is discrimination against aliens, not discrimination among a state's own nationals based on race, religion, ethnicity, or similar grounds, however despicable such discrimination

---

[3] Initially, *Abelesz* allowed the complaint to go forward due to the fact that the plaintiffs had pleaded not only an expropriation, but an independent violation of "[t]he international norm against genocide." 692 F.3d at 676. Ultimately, however, the court affirmed dismissal of the complaint in *Fischer* due to the plaintiffs' failure to exhaust Hungarian remedies. 777 F.3d at 872. In so holding, the court rejected the plaintiffs' argument that they did not have to show exhaustion to establish a violation of international law because, they contended, "a separate basis supported finding violations of international law: that the takings were 'discriminatory.'" *Id.* at 857.

might be." *Id.* Accordingly, even in cases of discrimination, "international law does not address a nation's taking of property from its own nationals." *Id.* at 858.

The Ninth Circuit applies the same rule. In *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), the court reviewed a district court's jurisdictional dismissal of expropriation claims brought against Argentina. The plaintiffs alleged that Argentina seized their property due to "a discriminatory motivation based on ethnicity." *Id.* at 712. In evaluating their claim, the court recognized that a "taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law." *Id.* (quoting Restatement § 712 cmt. f). But this claim was categorically unavailable to three of the plaintiffs because they were Argentinian citizens at the time of the expropriation, and "'expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.'" *Id.* at 711 (brackets omitted) (quoting *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)). The court held that "it is clear" that those plaintiffs "cannot assert a claim that comes within [the expropriation] exception." *Id.*

b. The D.C. Circuit applied a different standard below. It concluded that Restatement § 712 does indeed recognize "discriminatory takings claims" by a foreign state's own nationals. Pet. App. 16a. The court therefore held that H&P-V had asserted a violation of international law by claiming "that Venezuela has unreasonably discriminated against it on the basis of its sole shareholder's nationality, thus implicating an exception to the domestic takings

rule." Pet. App. 13a. Accordingly, in conflict with the decisions of the Seventh and Ninth Circuits, the D.C. Circuit recognized a "discriminatory takings claims" exception to the domestic-takings rule. Pet. App. 16a. This Court's review is necessary to reconcile the conflict.

2. The D.C. Circuit's decision is also wrong. As Judge Sentelle explained in dissent, "Venezuela's reliance on the domestic takings rule is well taken and should compel the dismissal of Helmerich & Payne's expropriation claim for want of jurisdiction." Pet. App. 33a. In holding otherwise, the majority did not follow the two-part Restatement analysis: first determining whether the property was taken from a national of another state, and only then, if the answer is yes, determining whether the taking falls into one of the prohibited categories. *See* Restatement § 712. Instead, the court reversed the order of the analysis and, in the process, effectively negated the rule that a state's taking of the property of its own national does not violate international law. The majority decided that—notwithstanding H&P-V's status as a Venezuelan corporation—H&P-V's claim fell within an exception to the domestic-takings rule because H&P-V's sole shareholder was American and H&P-V alleged that the taking was motivated by discrimination against Americans. Pet. App. 13a-17a.

No other court has ever applied such a rule to the expropriation exception. The only court to adopt a similar view is the Second Circuit in *Sabbatino*, 307 F.2d 845. But the D.C. Circuit should have left *Sabbatino* in the dustbin: it predates the FSIA. On top of that, it was decided on the merits—not jurisdictional grounds—at a time courts had very different views of their role in creating international law.

Sabbatino stated that courts "must be the custodians of the concepts of international law, and they must expound, apply and develop that law whenever they are called upon to do so." *Id.* at 861. This Court has since held to the contrary: "[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 728 (2004).

Furthermore, *Sabbatino* does not reflect "international law at the time of the FSIA's enactment." *Permanent Mission*, 551 U.S. at 199. International law at the time of the FSIA's enactment is exemplified by *Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belgium* v. *Spain)*, 1970 I.C.J. 3 (Feb. 5, 1970), decided just 6 years before enactment of the FSIA. There, the International Court of Justice (ICJ) held that corporations bear the nationality of their state of incorporation and are subject to that state's laws and protections. *Id.* at 42 ¶ 70. If those corporations "consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to * * * obtaining redress." *Id.* at 44 ¶ 78. *See also* Submission of the United States 2, *International Thunderbird Gaming Corp.* v *United Mexican States*, UNCITRAL Case (May 21, 2004), *available at* http://www.state.gov/documents/organization/32819.pdf (State Department filing recognizing same rule).[4]

---

[4] This Court has recognized *Barcelona Traction* as an authoritative source of international law in an FSIA case. *See First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*,

Even accepting *Sabbatino*'s discrimination exception on its own terms, moreover, this case is far removed from it. In *Sabbatino*, the alleged discrimination was apparent from the face of the government documents authorizing the expropriation in question. 307 F.2d at 865 & n.14. Similar discriminatory statements are absent from the official decrees authorizing the expropriation in this case. The majority had to strain to find any suggestion whatsoever of a discriminatory motive by reaching beyond the official decrees. It quoted a PDVSA press release and other non-official public statements by individual officials suggesting general hostility towards American involvement in Venezuelan businesses. The court then concluded that these sources could be imputed to Venezuela—and "viewed as demonstrating 'unreasonable distinction' based on nationality." Pet. App. 7a-8a, 16a-17a.

Not only is the majority's approach at odds with *Sabbatino* in that respect, it highlights another danger of its abrogation of the domestic-takings rule. The majority's reliance on non-official statements and public remarks threatens to open foreign states and their highest officeholders to intrusive demands for discovery in U.S. courts that go to the motivations for their actions. This has significant ramifications for U.S. diplomatic relations and foreign policy. And it is flatly inconsistent with other provisions of the FSIA. For example, the FSIA's tortious-activity exception does not reach any claim based upon a for-

---

462 U.S. 611, 628 n.20 (1983); *see also Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 384 (2006) (Ginsburg, J., dissenting) (courts have "repeatedly looked to the ICJ for guidance in interpreting treaties and in other matters of international law").

eign official's "exercise or performance or the failure to exercise or perform a discretionary function." 28 U.S.C. § 1605(a)(5). In short, the "exception" to the domestic-takings rule crafted by the majority is bad law and bad policy.

3. A final point on the discriminatory-takings exception. The majority below recognized:

> Having freely chosen to incorporate under Venezuelan law, H&P-V operated in that country for many years and reaped the benefits of its choice, including several extremely lucrative contracts with the Venezuelan government. Given this, and especially given that H&P-V expressly agreed that these contracts would be governed by Venezuelan law in Venezuelan courts, one might conclude that H&P-V should live with the consequences of its bargain. [Pet. App. 13a.]

Unlike the majority, Judge Sentelle concluded that this analysis was dispositive. He explained: "When appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law. To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate Venezuela's sovereignty, the value protected by the FSIA." Pet. App. 32a-33a. Judge Sentelle is correct, and this Court should grant review and reverse.

B. The Lower Court's Rejection Of Traditional Corporate Law Principles Under The FSIA Is Contrary To This Court's Precedent.

The second question presented is whether a shareholder can properly plead that its "rights in property" were "taken in violation of international law,"

when the only property taken belonged to a still-existing corporation. 28 U.S.C. § 1605(a)(3). The court below answered yes: "shareholders may have rights in corporate property" that they can assert under this provision. Pet. App. 20a. The court grounded its decision in a vacated Circuit case holding that a shareholder has property rights in corporate assets that are protected by the Fifth Amendment's Due Process Clause. *See* Pet. App. 19a-22a (discussing *Ramirez*, 745 F.2d at 1517). Traditional corporate law, however, holds that a shareholder has such no rights in corporate assets so long as the corporation continues to exist. *See, e.g.*, 18A Am. Jur. 2d Corporations § 623 (2015). The D.C. Circuit's rejection of that principle in an FSIA case is contrary to the holdings of this Court.

1. a. In *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), the Court considered whether, under 28 U.S.C. § 1603(b), "a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary." 538 U.S. at 471. To qualify as an instrumentality under the FSIA, a corporation must be one in which "a majority of * * * shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). The Court interpreted this language to mean "that only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement." *Dole Food*, 538 U.S. at 474. The Court did so because that interpretation was consistent with general corporate law, and "[i]t was evident from the Act's text that Congress was aware of set-

tled principles of corporate law and legislated within that context." *Id.* at 474.

The court below, by contrast, held that *Dole Food* is limited only to the particular provision at issue in that case, Section 1603(b). It ruled that "*Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA." Pet. App. 18a. And because of that, the Court declined to apply the bright-line rule separating a shareholder's rights in the corporation from a corporation's right in its assets. *See* Pet. App. 18a-19a.

This reasoning does not hold up under *Dole Food*, or traditional principles of statutory construction. The D.C. Circuit ignored *Dole Food*'s later holding, where this Court declined to apply a veil-piercing theory to Section 1603(b) because "FSIA gives no indication that Congress intended us to depart from the general rules regarding corporate formalities." 538 U.S. at 476. This is consistent with the usual rule that, "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States* v *Texas*, 507 U.S. 529, 534 (1993); *see also, e.g.*, *United States* v *Bennett*, 621 F.3d 1131, 1137 (9th Cir. 2010) ("We see no reason to set aside fundamental principles of corporate law in the context of the federal bank fraud statute, particularly where Congress provided no indication that we should do so."). Because the FSIA did not speak directly to abrogate general corporate law, those principles apply to the Act's provisions. *See EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 476 (2d Cir. 2007) (*Dole Food* held "that the FSIA did not affect underlying corporate law principles").

That is just what Judge Sentelle concluded. In response to the majority's assertion that "*Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA," Pet. App. 18a, Judge Sentelle wrote that "neither *Dole Food* nor any other case constitutes a wholesale rejection of corporate law," Pet. App. 33a. And that should been the end of the matter because the FSIA did not abrogate the rule that "shareholders ordinarily have no standing to assert claims on behalf of a corporation for its property." Pet. App. 34a. The majority's holding otherwise is in error.[5]

b. Indeed, the formal divide between shareholder rights and corporate rights is a universal concept. This Court has applied this principle in the standing context, recognizing a rule that "generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Franchise Tax Bd. of Cal.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990).

Likewise, time and again, courts have held that shareholder takings claims must fail because "shareholders do not directly own any part of a corporation's property or assets," and therefore "shareholders have no proprietary interest that could have been

---

[5] The decision below conflicts with *Dole Food* for a second reason. It allows shareholder plaintiffs to assert *indirect* rights in corporate property under the expropriation exception, which speaks only of "rights in property." *See* Pet. App. 19a-21a. This is contrary to *Dole Food*'s teaching that when Congress legislates about rights and interests, it means only *direct* rights and interests unless it expressly states otherwise. 538 U.S. at 476.

'taken.'" *Broad* v. *Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996). *See also Anderson* v. *Cox*, 503 F App'x 495, 496 (9th Cir. 2012) (same); *Byers* v. *United States*, 4 F App'x 763, 765 (Fed. Cir. 2001) (rejecting sole shareholder's takings claim for corporate property because the property belonged to the corporation, not the shareholder personally); *United States* v. *Acadiana Treatment Sys. Inc.*, 2000 WL 634145, at *4 (5th Cir. 2000) (shareholder lacked standing "to allege a taking of corporate assets"); *Duncan* v. *Peninger*, 624 F.2d 486, 490 (4th Cir. 1980) (individual owners of corporations could not claim any takings violation because they had "alleged no contract according them any right in the properties" in dispute, and "the corporation[s] *** were the owners" of those properties, "not the individual plaintiffs"). *Cf. New Orleans Debenture Redemption Co. of Louisiana* v. *Louisiana*, 180 U.S. 320, 332 (1901) (holding that a decree adjudging a corporate charter void did not implicate shareholders' property rights, noting that "[t]here has been no taking of any property belonging to shareholders").

The D.C. Circuit's recognition of shareholder property rights in corporate assets simply cannot be squared with these cases.

2. The D.C. Circuit nonetheless purported to find a basis for its recognition of free-form property rights under the FSIA in *Permanent Mission*, 551 U.S. 193. But *Permanent Mission* does not support the majority's holding that anything goes under the FSIA—in fact, the Court held just the opposite.

In *Permanent Mission*, the Court considered "whether the FSIA provides immunity to a foreign sovereign from a lawsuit to declare the validity of tax

liens on property held by the sovereign for the purpose of housing its employees." 551 U.S. at 195. The FSIA exception at issue abrogated immunity in cases "in which rights in immovable property situated in the United States are at issue." 28 U.S.C. § 1605(a)(4). As the D.C. Circuit rightly recognized, *Permanent Mission* refused to limit this exception "to actions contesting ownership or possession." 551 U.S. at 197 *See* Pet. App. 19a. But the court wrongly concluded that *Permanent Mission* interpreted the FSIA to require a court to accept whatever right in property a plaintiff claims, without evaluating whether it is recognized under the law. *See* Pet. App. 21a-22a. *Permanent Mission* made clear that the property right at issue still had to be *grounded in* a traditional source of property rights such as ownership, possession, or contract; the Court simply held that the FSIA did not limit actions to those contesting ownership or possession writ large. 551 U.S. at 198. A plaintiff could, as in *Permanent Mission*, bring suit for an action that "inhibits *one* of the quintessential rights of property ownership," such as "the right to convey." *Id.* (emphasis added).

The D.C. Circuit read this case instead to hold that "the FSIA's expropriation exception 'focuses * * * broadly on "rights in" property,' and its text imposes no limitation on the source of those rights." Pet. App. 22a (citation and emphasis removed). Far from deeming the source of the asserted right irrelevant, however, *Permanent Mission* closely examined substantive New York, bankruptcy, and common law to determine whether rights in property were implicated in the case. *See* 551 U.S. at 198-199. And as previously mentioned, it found that "one of the quintessential rights of property ownership" was inhibited.

Id. at 198. The D.C. Circuit left this part out of its analysis. It concluded that an FSIA plaintiff establishes jurisdiction under the expropriation exception by merely asserting unspecified property rights, even though they have no identifiable source in the law. Pet. App. 22a. This holding contradicts, rather than follows, *Permanent Mission*.

3. The lower court's decision is problematic for another reason: the expropriation exception requires that the plaintiff plead its property rights were "taken in violation of international law." That phrase has a specific reference point: the FSIA "codifi[ed] * * * international law at the time of the FSIA's enactment." *Permanent Mission*, 551 U.S. at 199. Yet the majority below failed entirely to account for international law in its ruling on H&P-IDC's claim. And therein lies the problem. In *Barcelona Traction*, the ICJ ruled: "So long as the company is in existence the shareholder has no right to the corporate assets." 1970 I.C.J. at 34 ¶ 41; *see also* Submission of the United States 2, *International Thunderbird Gaming Corp.* (State Department filing, citing the *Barcelona Traction* rule as authoritative). In holding that a shareholder *does* have rights in corporate property, the D.C. Circuit directly contradicted international law at the time of FSIA's enactment. Pet. App. 20a.[6]

---

[6] Not to mention that the D.C. Circuit's decision also has the effect of granting to H&P-IDC property rights in the assets of its subsidiary that it never had under Venezuela law. *See Hausman* v. *Buckley*, 299 F.2d 696, 698 n.5 (2d Cir. 1962) ("under Venezuelan law stockholders have no right to enforce any claim in favor of their corporation against officers, directors, or third parties").

4. In the end, the D.C. Circuit concluded that Circuit precedent—specifically the Due Process *Ramirez* decision—required it to hold that a shareholder has rights in corporate property under the FSIA's expropriation exception. *See* Pet. App. 19a-22a (discussing *Ramirez*, 745 F.2d at 1517).[7] Judge Sentelle explained exactly why this is wrong:

> *Ramirez* is not genuinely on point. *Ramirez* dealt with the question of whether the shareholders of a corporation ousted by acts of the United States government had a property interest warranting due process protection under the Constitution. The *Ramirez* Court had no occasion to consider whether the statutory waiver of a foreign government's sovereign immunity encompasses the sort of second degree property interest protected against invasion by our government under the due process concepts of our Constitution. [Pet. App. 36a.]

Again, Judge Sentelle set forth the correct view of the law This Court has held that "[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has

---

[7] The Court gave *Ramirez* precedential weight, Pet. App. 21a, despite the fact that the judgment in that case was vacated by this Court, and the opinion was not reinstated on remand. That too was error, because a "decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect." *Los Angeles Cnty.* v. *Davis*, 440 U.S. 625, 634 n.6 (1979) (quotation marks and ellipsis omitted).

transgressed those limits." *Sosa*, 542 U.S. at 727. The D.C. Circuit's expansion of international law using a Due Process decision violates this principle. Its decision should be reversed.

C. The Courts Of Appeals Are Divided Over Whether The "Wholly Insubstantial Or Frivolous" Standard For Federal-Question Jurisdiction Applies To FSIA Jurisdictional Dismissal Analysis.

1. The final question presented concerns the standard for reviewing jurisdictional pleadings under the FSIA's expropriation exception. Because the jurisdictional elements of the expropriation exception overlap with the merits of an international takings claim, the courts of appeals are divided on the appropriate standard to apply. Four circuits apply the usual Fed. R. Civ. P 12(b)(1) standards for testing the jurisdictional foundation of a complaint. In other words, they will look behind the pleadings and evaluate whether there is a sufficient basis for jurisdiction on a factual attack. And on a facial attack, they will apply what amounts to a Rule 12(b)(6) analysis to determine whether as a legal matter the plaintiff has pleaded the existence of plausible property rights, or a plausible violation of international law. Two circuits, including the D.C. Circuit, instead apply the minimal standard for pleading federal-question jurisdiction established in *Bell* v. *Hood*, 327 U.S. 678 (1946). They will not look behind the pleadings in any circumstance and will not evaluate whether the plaintiff has pleaded plausible property rights or a plausible violation of international law; instead, they will dismiss only if the pleaded basis for jurisdiction is wholly insubstantial or frivolous.

a. The Second, Seventh, Eighth, and Eleventh Circuits apply the usual Rule 12(b)(1) jurisdictional pleading rules to expropriation-exception cases.

The Second Circuit applies 12(b)(1) standards in expropriation-exception cases even if "the jurisdiction and merits inquiries overlap." *Robinson* v *Government of Malaysia*, 269 F.3d 133, 142 (2d Cir. 2001).[8] *See, e.g.*, *Orkin* v. *Swiss Confederation*, 444 F App'x 469, 470-471 (2d Cir. 2011); *Freund* v. *Societe Nationale des Chemins de fer Francais*, 391 F. App'x 939, 940-941 (2d Cir. 2010); *Zappia Middle E. Const. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 249, 251, 253 (2d Cir. 2000). This is because, "by permitting the district court to go beyond the bare allegations of the complaint," the court may "avoid[] 'putting the foreign government defendant to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity.'" *Robinson*, 269 F.3d at 142 (brackets omitted) (quoting *Segni* v. *Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir.1987)).

The Rule 12(b)(1) pleading rules apply in this context to the law as well as the facts: "[c]ourts are * * * regularly called upon to inquire into substantive state or federal law to resolve the threshold question of subject matter jurisdiction under the FSIA." *Id.* at

---

[8] Although *Robinson* is a tortious-activities-exception case, it has been applied in the expropriation-exception context. *See Freund*, 391 F App'x at 940. Moreover, *Robinson* relied on *Zappia Middle E. Const. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000), an expropriation case. *See Robinson*, 269 F.3d at 143 (discussing *Zappia*).

143. "[T]he applicability of the 'expropriation' exception *** *require[s]* a determination whether the defendant's conduct violated 'international law.'" *Id.* (emphasis added) (discussing *Zappia*, 215 F.3d at 250-252).[9]

The Seventh Circuit likewise applies plenary review to a complaint's jurisdictional allegations under the expropriation exception. *See Abelesz*, 692 F.3d at 669-670. In *Abelesz*, the court carefully evaluated the complaint and substantive international law to determine whether "the plaintiffs' allegations *** were sufficient to rely on the expropriation exception." *Id.* at 671. The court answered that question in part yes and in part no. It found "the plaintiffs' allegations about the relationship between genocide and expropriation in the Hungarian Holocaust" sufficed to plead a violation of "specific, universal, and obligatory" "international norm against genocide." *Id.* at 675-676. But the court concluded that "[b]ecause plaintiffs ha[d] not exhausted their Hungarian remedies and ha[d] not yet provided a legally compelling reason for their failure to do so, they ha[d] not established that their expropriation claims

---

[9] In another tortious-activity-exception case, *Moran* v. *Kingdom of Saudi Arabia*, 27 F.3d 169 (5th Cir. 1994), the Fifth Circuit affirmed the district court's use of the "12(b)(1) standard in determining the jurisdictional immunity issue under the FSIA," *id.* at 173, even where "the disputed jurisdictional facts concerning immunity under the FSIA were inextricably intertwined with the merits of *respondeat superior* liability alleged in his claim," *id.* at 172. As the court later explained in a different case, this approach was justified because "[t]he need for special procedures designed to preserve a foreign sovereign's immunity from suit is heightened in FSIA cases." *Montez* v. *Department of Navy*, 392 F.3d 147, 150 (5th Cir. 2004).

fall within an exception to the FSIA's grant of sovereign immunity." *Id.* at 697.

The Eighth Circuit follows suit. *See Community Fin. Grp., Inc.* v. *Republic of Kenya*, 663 F.3d 977, 980 (8th Cir. 2011) (quoting *Hastings* v. *Wilson*, 516 F.3d 1055, 1058 (8th Cir. 2008)). For example, if the defendant makes a facial jurisdictional challenge, "the nonmoving party receives the same protections for facial attacks under 12(b)(1) as it would defending against a motion brought under Rule 12(b)(6)." *Hastings*, 516 F.3d at 1058 (brackets omitted) (quoting *Osborn* v. *United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990)). In *Community Finance Group*, the court applied this standard to hold that the complaint did not plead facts that could constitute a taking. 663 F.3d at 981.

The Eleventh Circuit applies the same rules. For instance, when it reviewed a district court's dismissal on a facial jurisdictional challenge in *Mezerhane* v. *Republica Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015), it conducted a Rule 12(b)(6)-like review. *See id.* at 547 (citing *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 572 (2007)). The court evaluated whether the plaintiff had pleaded a violation of international law under the four treaties that the plaintiff cited. *Id.* at 548-549. It answered no, reasoning: "To date, the Eleventh Circuit has never held that the exception to sovereign immunity set out in 28 U.S.C. § 1605(a)(3) is triggered by human rights treaty-based allegations, and we decline to do so here." *Id.* at 549.

b. On the other side of the divide are the D.C. and Ninth Circuits. Both have declined to apply the usu-

al 12(b)(1) pleading standards to jurisdictional allegations under the expropriation exception.

The court below explained the D.C. Circuit's rule as follows: "In an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property *** in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" Pet. App. 11a (quoting *Agudas Chasidei Chabad of U.S.* v *Russian Federation*, 528 F.3d 934, 943 (D.C. Cir. 2008)). This is "the general test for federal-question jurisdiction under *Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946), and *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 513 & n.10 (2006)." *Agudas*, 528 F.3d at 940 (parallel citations omitted). It is intended to test only whether the plaintiff has "*assert[ed]* a particular type of claim," *id.* (emphasis added), not whether the claim is factually supported. The standard does not require a plaintiff to assert plausible rights in property; the plaintiff's "burden [i]s only to put its rights in property in issue in a non-frivolous way." *Id.* And a plaintiff does not have to show a plausible violation of international law—only "non-frivolous contentions." *Id.*

The Ninth Circuit applies the same test, as the D.C. Circuit recognized in *Agudas*. *See* 528 F.3d at 941-942 (discussing *Siderman*, 965 F.2d at 712-713; *West* v. *Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1986)). The Ninth Circuit holds: "At the jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction." *Cassirer* v. *Kingdom of Spain*, 616 F.3d

1019, 1027 (9th Cir. 2010) (en banc) (quotation marks omitted).

This barebones pleading requirement cannot be reconciled with the majority court of appeals view. And this case demonstrates that the difference matters. The D.C. Circuit held that H&P-V had pleaded jurisdiction based on a purported violation of international law—namely, a discrimination exception to the domestic-takings rule—because the D.C. Circuit had yet to *reject* the claimed violation of international law. Pet. App. 15a. By contrast, the Eleventh Circuit held that the plaintiff had *not* pleaded jurisdiction based on a purported violation of international law because the court had never before *accepted* the claimed violation of international law. 785 F.3d at 549. Accordingly, the result below would have been different if this case were brought in the Eleventh Circuit. This Court's review is therefore necessary to bring the courts of appeals in line under a single pleading standard.

2. In addition, the Court should grant review because the decision below is wrong. Under the FSIA, "a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). The D.C. Circuit lost sight of that fundamental principle when it held plaintiffs to a pleading standard no more demanding than that required by Fed. R. Civ. P 11 to avoid sanctions.

The D.C. Circuit's pleading standard is completely inadequate to determine whether foreign-sovereign immunity bars litigation. After all, the foreign sov-

ereign is immune from the burdens of litigation. A court therefore should give the foreign state "'an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity.'" *Robinson*, 269 F.3d at 142 (brackets omitted) (quoting *Segni*, 816 F.2d at 347). Yet the D.C. Circuit's standard precludes that result by failing to provide meaningful review at the motion-to-dismiss stage.

Instead, it evaluates jurisdictional pleadings under the expropriation exception the same way courts evaluate jurisdictional pleadings under the federal-question statute. "A claim invoking federal-question jurisdiction * * * may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" *Arbaugh*, 546 U.S. at 513 n.10 (quoting *Bell*, 327 U.S. at 682-683). This standard makes sense under 28 U.S.C. § 1331, which requires only that a case "aris[e] under the Constitution, laws, or treaties of the United States," and which was not drafted with foreign sovereigns in mind. But it has no place under the FSIA's expropriation exception, which requires that "rights in property taken in violation of international law [be] in issue," *id.* § 1605(a)(3), and where "[t]he need for special procedures designed to preserve a foreign sovereign's immunity from suit is heightened," *Montez*, 392 F.3d at 150. The D.C. Circuit's "exceptionally low" pleading standard does not give the protection to foreign sovereigns that the FSIA requires. Pet. App. 11a.

II. THE D.C. CIRCUIT'S DECISION IMPLICATES VITALLY IMPORTANT QUESTIONS OF FOREIGN-SOVEREIGN IMMUNITY UNDER FEDERAL LAW.

The decision below expands federal jurisdiction over the sovereign actions of foreign states in their own territories. The Court has traditionally recognized the importance of these types of cases, granting review of decisions potentially infringing foreign states' sovereignty a dozen times in as many years—most recently in *OBB Personenverkehr AG* v. *Sachs*, S. Ct. No. 13-1067 [10] In *Sachs*, which will be argued in October, the Court will determine the requirements for pleading jurisdiction under the FSIA's commercial-activities exception, and the appropriate sources of law that a court should consult when interpreting statutory terms in that exception. This case concerns the same types of questions under the expropriation exception—a basis for jurisdiction

---

[10] *See, e.g.*, *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014); *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702 (2012); *Samantar* v. *Yousuf*, 560 U.S. 305 (2010); *Republic of Iraq* v. *Beaty*, 556 U.S. 848 (2009); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 556 U.S. 366 (2009); *Republic of Philippines* v. *Pimentel*, 553 U.S. 851 (2008); *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. 450 (2006); *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004); *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003).

frequently cited by litigants suing foreign states.[11] Review is thus warranted in this case, just as it was in *Sachs*.

The reasons for this Court's review are also compelling because of the discord among the courts of appeals, and between this Court's precedents and the decision below, on the reach of federal jurisdiction under the expropriation exception. The conflict cannot be allowed to stand because the purpose of the FSIA is to ensure "'a uniform body of law in this area'" "'in view of the potential sensitivity of actions against foreign states.'" *Verlinden*, 461 U.S. at 489 (brackets removed) (quoting H.R. Rep. No. 94-1487, at 32). Indeed, "'uniformity in decision'" is essential because "'disparate treatment of cases involving foreign governments may have adverse foreign relations

---

[11] *See, e.g.*, *Geon* v. *Republic of Korea*, No. 13-CV-13251-DJC, 2015 WL 2376059, at *6-*7 (D. Mass. May 18, 2015); *Eliahu* v *Israel*, No. 14-CV-01636-BLF, 2015 WL 981517, at *4-*6 (N.D. Cal. Mar. 3, 2015); *de Csepel* v. *Republic of Hungary*, 75 F Supp. 3d 380, 381-382 (D.D.C. 2014); *Ezeiruaku* v. *Bull*, No. CIV.A. 14-2567 JBS, 2014 WL 5587404, at *5-*6 (D.N.J. Nov. 3, 2014), *aff'd*, No. 15-1174, 2015 WL 4185539 (3d Cir. July 13, 2015); *Rhuma* v. *State of Libya*, No. 2:13-CV-2286 MCEACPS, 2014 WL 5486604, at *3-*4 (E.D. Cal. Oct. 29, 2014); *Chettri* v. *Nepal Bangladesh Bank, Ltd.*, No. 10 CIV 8470 PGG, 2014 WL 4354668, at *16-*19 (S.D.N.Y. Sept. 2, 2014); *LaLoup* v. *United States*, 29 F Supp. 3d 530, 547-552 (E.D. Pa. 2014); *Smith Rocke Ltd.* v. *Republica Bolivariana de Venezuela*, No. 12 CV 7316 LGS, 2014 WL 288705, at *5-*11 (S.D.N.Y. Jan. 27, 2014); *Best Med. Belgium, Inc.* v. *Kingdom of Belgium*, 913 F. Supp. 2d 230, 239-241 (E.D. Va. 2012); *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 898 F. Supp. 2d 301, 311-312 (D. Mass. 2012), *aff'd*, 727 F.3d 10 (1st Cir. 2013); *S.K. Innovation, Inc.* v. *Finpol*, 854 F. Supp. 2d 99, 113-114 (D.D.C. 2012).

consequences.'" *Goar* v. *Compania Peruana de Vapores*, 688 F.2d 417, 422 (5th Cir. 1982) (quoting H.R. Rep. 94-1487, at 13).

Finally, this case in particular warrants review because it is likely to be the dispositive construction of the FSIA's expropriation exception. Under the federal-venue statute, every case against a foreign state or a political subdivision thereof may be brought in the District of Columbia. 28 U.S.C. § 1391(f)(4). The lower court's rejection of the domestic-takings rule and its green light to shareholders to make claims based on the taking of corporate property, joined with its lax to non-existent pleading standard, invite parties challenging expropriations to bring such claims in the D.C. Circuit. Thus, the majority's holding is not a one-off decision having no ramifications beyond this case. Rather, it is likely to chart the course in virtually all cases against foreign states under the FSIA's expropriation exception. Any decision of that significance warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

JOSEPH D. PIZZURRO
ROBERT B. GARCÍA
101 Park Avenue
New York, NY 10178

HOGAN LOVELLS US LLP

BRUCE D. OAKLEY
Counsel of Record
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

WILLIAM L. MONTS, III
MARY HELEN WIMBERLY
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Petitioners

October 2015

APPENDICES

APPENDIX A—Court of Appeals Opinions (May 1, 2015)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 16, 2015 Decided May 1, 2015

No. 13-7169

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND
HELMERICH & PAYNE DE VENEZUELA, C.A.,

Appellees,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

Appellee,

PETRÓLEOS DE VENEZUELA, S.A. AND
PDVSA PETRÓLEO, S.A.,

Appellants.

Consolidated with 13-7170, 14-7008

Appeals from the United States District Court
for the District of Columbia
(No. 1:11-cv-01735)

Mary H. Wimberly argued the cause for appellant/cross-appellee Bolivarian Republic of Venezuela. *Joseph D. Pizzurro* argued the cause for appellants/cross-appellees Petróleos De Venezuela, S.A. and PDVSA Petróleo, S.A. With them on the briefs were *Robert B. Garcia*, *George E. Spencer*, *William L. Monts III*, and *Bruce D. Oakley*

David W. Ogden argued the cause for appellee/cross-appellant Helmerich & Payne De Venezuela, C.A. With him on the briefs were *David W. Bowker*, *Catherine M Carroll*, *Elisebeth C. Cook*, and *Francesco Valentini*.

Before: GARLAND, *Chief Judge*, TATEL, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* SENTELLE

TATEL, *Circuit Judge:* The Foreign Sovereign Immunities Act (FSIA) grants foreign states immunity from suit in American courts unless one of several enumerated exceptions applies. In this case, after Venezuela forcibly seized oil rigs belonging to the Venezuelan subsidiary of an American

corporation, both the parent and the subsidiary filed suit in the United States asserting jurisdiction under the FSIA's expropriation and commercial activity exceptions. Venezuela moved to dismiss on the ground that neither exception applies. The district court granted the motion as to the subsidiary's expropriation claim, but denied it in all other respects. For the reasons set forth in this opinion, we affirm in part and reverse in part. We agree with the district court that the parent corporation had sufficient rights in its subsidiary's property to support its expropriation claim. But because the subsidiary's expropriation claim is neither "wholly insubstantial" nor "frivolous"—this Circuit's standard for surviving a motion to dismiss in an FSIA case—the district court should have allowed that claim to proceed. And given that the subsidiary's commercial activity had no "direct effect" in the United States, which the FSIA requires to defeat foreign sovereign immunity, the district court should have granted the motion to dismiss with respect to that claim.

I

For more than half a century, Oklahoma-based Helmerich & Payne International Drilling Co. (H&P-IDC) successfully operated an oil-drilling business in Venezuela through a series of subsidiaries. Incorporated under Venezuelan law, the most recent subsidiary, Helmerich & Payne de

Venezuela (H&P-V), provided drilling services for the Venezuelan government. Having nationalized its oil industry in the mid-70s, Venezuela now controls exploration, production, and exportation of oil through two state-owned corporations: Petróleos de Venezuela, S.A. (PDVSA) and PDVSA Petróleo, known collectively as PDVSA. From its creation in 1975 through 2010, PDVSA depended on H&P-V's highly valuable and rare drilling rigs because they were capable of reaching depths of more than four miles. Those rigs were originally purchased by H&P-IDC and then transferred to its subsidiary H&P-V At issue here are ten contracts executed in 2007 between H&P-V and PDVSA, each involving one of these rigs—nine in Venezuela's eastern region and one in the west. The contracts initially covered periods ranging from five months to one year, though all were subsequently extended.

Soon after signing the contracts, PDVSA fell substantially behind in its payments. By August 2008, unpaid invoices totaled $63 million. PDVSA never denied its contractual debt; quite to the contrary, it repeatedly reassured H&P-V that payment would be forthcoming. But no payments were made, and after overdue receivables topped $100 million, H&P-V announced in January 2009 that it would not renew the contracts absent "an improvement in receivable collections." Compl. ¶ 50 (internal quotation marks omitted). By November of that year, H&P-V had fulfilled all of its contractual

obligations, disassembled its drilling rigs, and stacked the equipment in its yards pending payment by PDVSA.

PDVSA made no further payments. Instead, on June 12, 2010, PDVSA employees, assisted by armed soldiers of the Venezuelan National Guard, blockaded H&P-V's premises in western Venezuela, and then did the same to the company's eastern properties on June 13 and 14. PDVSA acknowledged that it erected the blockade to "prevent H&P-V from removing its rigs and other assets from its premises, and to force H&P-V to negotiate new contract terms immediately." *Id.* ¶ 63.

In the wake of the blockade, PDVSA issued a series of press releases that are central to H&P-V's expropriation claim. The first, issued on June 23, stated that "[t]he Bolivarian Government, through [PDVSA had] nationalized 11 drilling rigs belonging to the company Helmerich & Payne[], a U.S. transnational firm." *Id.* ¶ 65. A second press release, dated June 25, declared that PDVSA's "workers are guarding the drills" and that:

> The nationalization of the oil production drilling rigs from the American contractor H&P not only will result in an increase of oil and gas production in the country, but also in the release of more than 600 workers and the increase of new sources of direct and

> indirect employment in the hydrocarbon sector.

Id. ¶ 66. The June 25 release also "emphatically reject[ed] statements made by spokesmen of the American empire—traced [*sic*] in our country by means of the oligarchy." *Id.* ¶ 108 (alterations in original). Another press release, this one undated, stated that the nationalization would "guarantee that the drills will be operated by PDVSA as a company of all Venezuelans, ensur[ing] the rights of former employees of H&P, who a year ago were exploited and then dismissed by this American company, but now they will become part of PDVSA." *Id.* ¶ 109.

On June 29, more than two weeks after the blockade began, the Venezuelan National Assembly issued an official "Bill of Agreement" declaring H&P-V's property to be "of public benefit and good" and recommending that then-President Hugo Chavez promulgate a Decree of Expropriation. *Id.* ¶ 4. President Chavez issued the decree, which emphasized that "the availability of drilling equipment [such as H&P-V's] is very low both in the country and at world level, and the lack thereof would affect [Venezuela's national oil drilling] Plan." *Id.* ¶¶ 4, 19 (alterations in original). The decree directed PDVSA to take "forcible" possession of H&P-V's drilling rigs and other property. *Id.* ¶ 4. In response, PDVSA, having already taken possession

of the property, issued a press release on July 2, which stated that H&P-V's rigs "are specialized drills we need for more complex sites" and "will be very useful." *Id.* ¶ 20.

That same day, Jesus Graterol, president of the Venezuelan National Assembly's Committee on Energy and Mines, criticized opponents of the nationalization for acting "in accordance with the instructions of the [U.S.] Department of State" and trying to "subsidize the big business transnational corporations, so that they can promote what they know best to do, which is war through the large military industry[] of the Empire and its allies." *Id.* ¶ 105 (first alteration in original). Rafael Ramirez, Venezuela's Minister of Energy and Petroleum and PDVSA's President, led a political rally at H&P-V's eastern site and declared:

> The company Helmerich & Payne has operated in our country for many years. Today, the Revolutionary Government took control over that company. You have been here guarding assets that now belong to the Venezuelan State. I acknowledge and appreciate your constant watch in order to protect the people's interests. Revolutionary salutation: Socialist Nation or Death. We shall be victorious!

Id. ¶ 5 (ellipses omitted). Ramirez also referred to H&P-V as an "American company" with "foreign

gentlemen investors" and Venezuelan workers who would now "become part of [PDVSA's] payroll." *Id.* As Ramirez predicted, PDVSA now uses H&P-V's rigs and other assets in its state-owned drilling business.

Supposedly to compensate H&P-V for the expropriated property, PDVSA filed two eminent domain actions in Venezuelan courts. H&P-V has yet to receive service of process in the first proceeding, and the second has been stayed indefinitely. Believing that these proceedings are unlikely to result in adequate relief, H&P-V and its American parent, H&P-IDC, filed a two-count complaint under the FSIA in the United States District Court for the District of Columbia. The first count, brought against PDVSA and Venezuela, alleges a taking of property in violation of international law and asserts jurisdiction under the FSIA's expropriation exception. The second count, brought only against PDVSA, alleges breach of the ten drilling contracts and asserts jurisdiction under the statute's commercial activity exception.

Venezuela and PDVSA moved to dismiss on the grounds that neither FSIA exception applies and that the act-of-state doctrine, under which American courts "will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders," *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004), bars the suit

altogether. Before the district court could decide this motion, the parties filed a joint stipulation in which they agreed to brief four threshold issues:

1. Whether, for purposes of determining if a "taking in violation of international law" has occurred under the FSIA's expropriation exception, H&P-V is a national of Venezuela under international law;

2. Whether H&P-IDC has standing to assert a taking in violation of international law on the basis of Venezuela's expropriation of H&P-V's property;

3. Whether plaintiffs' expropriation claims are barred by the act-of-state doctrine, including whether this defense may be adjudicated prior to resolution of Venezuela's challenges to the court's subject matter jurisdiction; and

4. Whether, for purposes of determining the applicability of the FSIA's commercial activity exception, plaintiffs have sufficiently alleged a "direct effect" in the United States within the meaning of that provision.

The district court resolved the first question in Venezuela's favor but sided with Helmerich & Payne on the other three. Venezuela and PDVSA now appeal, reiterating arguments they made in the district court. H&P-V cross-appeals on the first question. We review de novo a district court's

resolution of a motion to dismiss for lack of jurisdiction under the FSIA. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 597 (D.C. Cir. 2013). Critically, moreover, "we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor." *Id.* (internal quotation marks omitted).

II

The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992). The Act provides that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. § 1604 (emphasis added), unless one of several exceptions applies, *id.* §§ 1605-07 H&P-V and H&P-IDC invoke the expropriation exception for their takings claim. H&P-V invokes the commercial activity exception for its breach of contract claim. We address each in turn.

Expropriation Exception

This exception, contained in FSIA section 1605(a)(3), denies foreign sovereign immunity "in any case in which rights in property taken in violation of international law are in issue."

28 U.S.C. § 1605(a)(3). According to Venezuela, the exception is inapplicable here for two reasons. First, as a Venezuelan national, H&P-V may not claim a taking in violation of *international* law. Second, under generally applicable corporate law principles, H&P-IDC has no "rights in property" belonging to its subsidiary and thus lacks standing.

In deciding a motion to dismiss for lack of jurisdiction, we are mindful of the distinction between jurisdiction—a court's constitutional or statutory power to decide a case—and ultimate success on the merits. As the Supreme Court has explained, "[j]urisdiction . is not defeated by the possibility that the averments [in a complaint] might fail to state a cause of action on which petitioners could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). What plaintiffs must allege to survive a jurisdictional challenge, then, "is obviously far less demanding than what would be required for the plaintiffs case to survive a summary judgment motion" or a trial on the merits. *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008). In an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a "taking in violation of international law" or has no "rights in property in issue" *only* if the claims are "wholly insubstantial or frivolous." *Id.* at 943. A claim fails to meet this exceptionally low bar if prior judicial decisions "inescapably render the claim[] frivolous"

and "completely devoid of merit." *Hagans v. Lavine*, 415 U.S. 528, 538, 543 (1974). "[P]revious decisions that merely render claims of doubtful or questionable merit do not render them insubstantial" for jurisdictional purposes. *Id.* at 538. Applying this standard to the present case, and viewing the complaint "in the light most favorable to the plaintiff," *Sachs v. Bose*, 201 F.2d 210, 210 (D.C. Cir. 1952), we first consider whether H&P-V has asserted a non-frivolous international expropriation claim and then ask whether H&P-IDC has "put its rights in property in issue in a non-frivolous way," *Chabad*, 528 F.3d at 941.

As to the first inquiry, the parties begin on common ground. All agree that for purposes of international law, "a corporation has the nationality of the state under the laws of which the corporation is organized," Restatement (Third) of Foreign Relations Law § 213 (1987), and that generally, a foreign sovereign's expropriation of its own national's property does not violate international law, *United States v. Belmont*, 301 U.S. 324, 332 (1937). The Supreme Court has summarized the latter principle, known as the "domestic takings rule," this way: "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled." *Id.*

According to Venezuela, the domestic takings rule ends this case because H&P-V, as a Venezuelan national, may not seek redress in an American court for wrongs suffered in its home country. This argument has a good deal of appeal. Having freely chosen to incorporate under Venezuelan law, H&P-V operated in that country for many years and reaped the benefits of its choice, including several extremely lucrative contracts with the Venezuelan government. Given this, and especially given that H&P-V expressly agreed that these contracts would be governed by Venezuelan law in Venezuelan courts, one might conclude that H&P-V should live with the consequences of its bargain.

According to H&P-V, however, this case is not so simple. It argues that Venezuela has unreasonably discriminated against it on the basis of its sole shareholder's nationality, thus implicating an exception to the domestic takings rule. In support, H&P-V cites *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), in which the Second Circuit determined that the Cuban government's expropriation of a Cuban corporation's property qualified as a taking in violation of international law More than 90% of the Cuban corporation's shares were owned by Americans, and the official expropriation decree "clearly indicated that the property was seized because [the corporation] was owned and controlled by Americans." *Id.* This, the Second Circuit held,

justified disregarding the domestic takings rule: "When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for [the court] in passing on the validity of that treatment to look only to the nationality of the corporate fiction." *Id.* (internal quotation marks omitted). Although the Supreme Court vacated this decision on other grounds, the Second Circuit later reiterated "with emphasis" its decision to disregard the domestic takings rule in the face of Cuba's anti-American discrimination. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 185 (2d Cir. 1967).

H&P-V also relies on the most recent Restatement of Foreign Relations Law, which recognizes discriminatory takings as a violation of international law. Specifically, section 712 suggests that "a program of taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law." Restatement (Third) of Foreign Relations Law § 712 cmt. f. (1987). "Discrimination," the Restatement continues, "implies *unreasonable* distinction," and so "Makings that invidiously single out property of persons of a particular nationality would be [discriminatory]," whereas "classifications, even if based on nationality, that are rationally related to the state's security or economic policies might not be [discriminatory]" and thus not in violation of international law. *Id.* (emphasis added).

The reporter's notes to section 712 cite *Sabbatino* as an example of a discriminatory taking, explaining that Cuba's express "purpose was to retaliate against United States nationals for acts of their Government, and was directed against United States nationals exclusively." *Id.* § 712 reporter's note 5.

H&P-V insists that its complaint, which emphasizes the Venezuelan government's well-known anti-American sentiment, as well as PDVSA's statements decrying the "American empire," successfully pleads a discriminatory takings claim. For its part, Venezuela urges us not to "be the first to revive the overturned Second Circuit precedent" because "there is no internationally recognized exception—based on 'discrimination' or otherwise—to the domestic takings rule." Defs.' Cross Br. 28, 30. Dated and uncited as it may be, however, *Sabbatino* remains good law. *See Farr*, 383 F.2d at 166 (affirming *Sabbatino's* discriminatory takings rationale "with emphasis"). Although "we are not *bound* by the decisions of other circuits," Dissent at 3 (emphasis added), we may "of course find the reasons given for such [decisions] persuasive," *Northwest Forest Resource Council v. Dombeck*, 107 F.3d 897, 900 (D.C. Cir. 1997) (quoting James Moore et al., *Moore's Federal Practice* ¶ 0.402 (2d ed. 1996))—especially where, as here, our circuit has yet to consider the issue. Moreover, neither Venezuela nor the dissent

cites any decision from any circuit that so completely forecloses H&P-V's discriminatory takings theory as to *"inescapably* render the claim[] frivolous" and *"completely* devoid of merit." *Hagans*, 415 U.S. at 538 (emphases added). Given this, and given the Restatement's recognition of discriminatory takings claims, we believe that H&P-V has satisfied this Circuit's forgiving standard for surviving a motion to dismiss in an FSIA case.

Alternatively, Venezuela claims that even if international law recognizes discriminatory takings, "plaintiffs have failed to plead facts to support it" because "the motivation for the expropriation was Venezuela's need for H&P-V's uniquely powerful rigs." Defs.' Br. 31. As it points out, the official decrees cited only the scarcity of these powerful rigs as the reason for the expropriation. The Bill of Agreement, for example, declared H&P-V's drilling rigs necessary for Venezuela's "public benefit and good," Compl. ¶ 4, and President Chavez's decree stated that "the lack thereof would affect [Venezuela's national oil drilling] Plan," *id.* ¶ 19 (alteration in original). Based on these statements, it may well be, as the Restatement puts it, that the taking was "rationally related to [Venezuela's] security or economic policies." Restatement (Third) of Foreign Relations Law § 712 cmt. f (1987).

Other statements, however, went well beyond Venezuela's economic and security needs and could

be viewed as demonstrating "unreasonable distinction" based on nationality. *Id.* PDVSA's press release referred to the "American empire," Compl. ¶ 108, and a National Assembly member warned that opponents of the expropriation were supporting America's mission of "war[] through the large military industry[] of the Empire and its allies," *id.* ¶ 105. At this stage of the litigation, where we view the complaint "in the light most favorable to the plaintiff," *Sachs*, 201 F.2d at 210, these statements are sufficient to plead a "non-frivolous" discriminatory takings claim, *Chabad*, 528 F.3d at 941.

We turn next to Venezuela's argument that H&P-IDC may not invoke the FSIA's expropriation exception because it has no rights in H&P-V's property. By its terms, the expropriation exception applies only to plaintiffs having "rights in property" taken in violation of international law. Moreover, and quite apart from the FSIA, plaintiffs must demonstrate Article III standing by asserting their "own legal rights and interests" rather than resting "claim[s] to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The "shareholder standing rule" is an example of this latter principle. Because corporations are legally distinct from their shareholders, the rule "prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management

has refused to pursue the same action for reasons other than good-faith business judgment." *Franchise Tax Board of California v. Akan Aluminium Limited*, 493 U.S. 331, 336 (1990). Combining both of these principles, Venezuela argues that as a mere shareholder, H&P-IDC has no rights in the property of its subsidiary and thus lacks standing.

In support of this argument, Venezuela relies almost entirely on *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), an FSIA case in which the Supreme Court held that "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Id.* at 475. This, according to Venezuela, means that "in enacting the FSIA, Congress specifically intended that basic corporate law concepts inform the interpretation of the statute," Defs.' Opening Br. 23, and thus "rights in property" must mean corporate ownership.

Contrary to Venezuela's assertion, however, *Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA. The issue in that case was whether a corporate subsidiary qualified as an instrumentality of a foreign state under the FSIA where the foreign state did not own a majority of the subsidiary's shares but did own a majority of the corporate parent's shares. *Dole Food Co.*, 538 U.S. at 471. Answering that question in the negative, the

Court focused on FSIA section 1603(b)(2), which defines "instrumentality" as "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof[.]" *Id.* at 473. Given this definition, the Court refused to "ignore corporate formalities" not because the FSIA generally incorporates corporate law principles, but because section 1603(b)(2) expressly "speaks of ownership." *Id.* at 474.

By contrast, FSIA section 1605(a)(3), the expropriation exception, speaks only of "rights in property" generally, not ownership in shares. The Supreme Court's analysis of another FSIA exception is instructive. In *Permanent Mission of India to the United Nations v. City of New York*, the Court examined the FSIA's abrogation of sovereign immunity in cases involving "rights in immovable property situated in the United States." 551 U.S. 193, 197 (2007) (quoting 28 U.S.C. § 1605(a)(4)). An instrumentality of the Indian government argued that the FSIA "limits the reach of the exception to actions contesting ownership or possession." *Id.* Seeing no such limitation in the statute's text, the Court concluded that "the exception focuses more broadly on 'rights in' property." *Id.* at 198.

So too here. The expropriation exception requires only that "rights in property are in issue," § 1605(a)(3), and we have recognized that corporate

ownership aside, shareholders may have rights in corporate property. In *Ramirez de Arellano v. Weinberger*, for example, we considered whether an American citizen, the sole shareholder of three Honduran corporations, had a "cognizable property interest" in land owned by the Honduran corporations and seized by the United States government. 745 F.2d 1500, 1517 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985). Whether Ramirez had property rights in the land, we held, "does *not* turn on whether certain rights which may belong *only* to the Honduran corporation may be asserted 'derivatively' by the sole United States shareholders." *Id.* at 1516. Instead, property rights depend upon whether the shareholders have "rights *of their own*, which exist by virtue of their exclusive beneficial ownership, control, and possession of the properties and businesses allegedly seized." *Id.* We thus concluded that notwithstanding corporate ownership, Ramirez had property rights in the Honduran property that he "personally controlled and managed . for over 20 years." *Id.* at 1520. "The corporate ownership of land and property," we held, "does not deprive the sole beneficial owners—United States citizens—of a property interest." *Id.* at 1518; *see also Bangor Punta Operations, Inc. v. Bangor & A. R. Co.*, 417 U.S. 703, 713 (1974) (rejecting the argument that, in assessing standing, courts "may not look behind the corporate entity to

the true substance of the claims and the actual beneficiaries").

Our dissenting colleague questions the precedential value of *Ramirez* because it was vacated by the Supreme Court on other grounds. Dissent at 4-5. But we have held that "[w]hen the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (quoting *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991)). Because the Supreme Court did not address *Ramirez's* holding that the shareholders had property rights in their corporation's assets, but instead vacated and remanded in light of the U.S. military's subsequent withdrawal of all personnel and facilities from the plaintiffs' land, *De Arellano v. Weinberger*, 788 F.2d 762, 764 (D.C. Cir. 1986) (en banc) (per curiam); *see Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985), that holding continues to have "precedential weight," *Adewani*, 467 F.3d at 1342.

The dissent argues that even if *Ramirez* continues to have force, it "is not genuinely on point" because it concerned property rights arising from the constitution's due process clause. Dissent at 5. But

as discussed above, the FSIA's expropriation exception "focuses *broadly* on 'rights in' property," *Permanent Mission*, 551 U.S. at 198 (emphasis added), and its text imposes no limitation on the source of those rights.

Ramirez is especially persuasive in this case because H&P-IDC, like the American citizen in *Ramirez*, was the foreign subsidiary's sole shareholder. Moreover, H&P-IDC provided the rigs central to this dispute, Compl. ¶¶ 9, 129-32, and as a result of the expropriation, has suffered a total loss of control over its subsidiary, which has ceased operating as an ongoing enterprise because *all* of its assets were taken, Compl. ¶¶ 75, 81-82. Under these circumstances, H&P-IDC has "put its rights in property in issue in a non-frivolous way." *Chabad*, 528 F.3d at 941. No more is required to survive a motion to dismiss under the FSIA. *See id.* ("non-frivolous contentions" of rights in property suffice to survive a motion to dismiss).

One final point. In the district court, Venezuela urged dismissal of Helmerich & Payne's expropriation claims pursuant to the act-of-state doctrine, which "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). The district court never reached the issue, opting instead to

determine "whether subject-matter jurisdiction exists under the FSIA before deciding whether to dismiss the case under the act of state doctrine." *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 971 F Supp. 2d 49, 63 (D.D.C. 2013). Acknowledging that the district court's decision is not subject to interlocutory appeal, *see, e.g.*, *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 855 (D.C. Cir. 2000), Venezuela urges us to exercise pendant jurisdiction over this claim. But we "exercise such jurisdiction sparingly" and are especially reluctant to do so where "an issue . might be mooted or altered by subsequent district court proceedings." *Id.* Here, Helmerich & Payne's expropriation claims could well fail at the summary judgment stage or following trial on the merits, thus mooting the act-of-state issue. Given this, we think it best not to exercise pendant jurisdiction over Venezuela's act-of-state claim.

Commercial Activity Exception

This brings us, finally, to H&P-V's argument that the FSIA's commercial activity exception extends to its breach of contract claim against PDVSA. This exception, contained in section 1605(a)(2), nullifies foreign sovereign immunity in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; *or* upon an act

> performed in the United States in connection with a commercial activity of the foreign state elsewhere; *or* upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2)(emphases added). Because this case involves a contract executed and performed outside the United States, our analysis focuses on the exception's third clause—specifically, whether Venezuela's breach of the drilling contracts "cause[d] a direct effect in the United States." *Id.* A direct effect "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). H&P-V alleges three such effects.

First, relying on our decision in *Cruise Connections Charter Management v. Canada*, 600 F.3d 661 (D.C. Cir. 2010), H&P-V argues that its contracts with third-party vendors in the United States, made pursuant to the drilling contracts, constitute a direct effect. In *Cruise Connections*, we found a "direct effect" where the Royal Canadian Mounted Police (RCMP) cancelled a contract with a U.S. corporation to provide cruise ships during the 2010 Winter Olympics. *Id.* at 662. H&P-V argues that just as in *Cruise Connections*, where the RCMP contract

"required subcontract[s] with two U.S.-based cruise lines," *id.*, its agreements with PDVSA required contracts with U.S.-based companies for various drilling rig parts. PDVSA responds that even if H&P-V subcontracted with U.S. vendors, nothing in the drilling contracts obligated them to do so.

We need not resolve this dispute, however, because even assuming that the drilling contracts required subcontracts with American companies, those contracts had no direct effect in the United States. Our holding in *Cruise Connections* rested not on the mere formation of third-party contracts in the United States, but rather on "*losses* caused by the *termination* of [the] contract with [Royal Canadian Mounted Police]." *Cruise Connections*, 600 F.3d at 664 (emphases added); *see also id.* at 666 (noting that the "alleged breach resulted in the direct loss of millions of dollars worth of business in the United States."). Here, H&P-V concedes that none of the third-party contracts was breached. Compl. ¶¶ 126-128, 135. As a result, no losses, and therefore no "direct effect," occurred in the United States.

We are unpersuaded by H&P-V's argument that its inability to renew the third-party contracts constitutes a direct effect caused by PDVSA's breach. Pls.' Br. 62. As noted above, H&P-V had already performed all of its obligations under the existing third-party contracts. Its claim of third-

party loss is therefore based on expected loss from *future* contracts that H&P-V says it would have entered into had PDVSA renewed its own contracts with H&P-V instead of breaching them. But H&P-V makes no allegation that PDVSA had an *obligation* to renew its contracts. *See* Compl. ¶ 33 ("All ten contracts . expired at the conclusion of an agreed-upon period unless the parties agreed to an extension or an extension occurred by the contract's original terms."). Accordingly, any losses to third parties based on expected future contracts were not a direct effect of PDVSA's breach, but rather of PDVSA's contractually permitted decision not to renew its agreement with H&P-V

Contrary to H&P-V's argument, *Kirkham v. Société Air France*, 429 F.3d 288 (D.C. Cir. 2005), does not require a different result. *Kirkham* involved the commercial activity exception's first clause. *See id.* at 290. H&P-V invokes the exception's third clause, under which the "direct effect" in the United States must arise from the foreign state's allegedly unlawful act—here, the breach of contract. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 609 (1992) (examining "whether the Republic of Argentina's default on certain bonds" had a direct effect in the United States).

Relying on the Supreme Court's decision in *Republic of Argentina v. Weltover*, 504 U.S. 607

(1992), H&P-V claims a second effect in the United States: that PDVSA made payments to Helmerich & Payne's Oklahoma bank account. In *Weltover*, Argentina had issued bonds providing for payment through a currency transfer on the London, Frankfurt, Zurich, or New York markets at the discretion of the creditor. *Id.* at 609-10. Two Panamanian bondholders demanded payment in New York, and when Argentina failed to pay, brought suit in the United States, claiming jurisdiction under the commercial activity exception. *Id.* at 610. The Court had "little difficulty" finding a direct effect because, as a result of Argentina's failure to meet its payment obligations, a contractually required payment into an American bank was not made. *Id.* at 618-19. Relying on *Weltover*, H&P-V emphasizes that both the eastern and western contracts permitted PDVSA to pay a portion of invoiced amounts in U.S. dollars into an American bank—indeed, PDVSA ultimately paid $65 million this way. Compl. ¶ 44. As in *Weltover*, then, PDVSA's breach meant that money "that was supposed to have been delivered to [an American] bank for deposit was not forthcoming." 504 U.S. at 619. But as PDVSA points out, the contracts gave H&P-V no power to demand payment in the United States. Rather, under both the eastern and western contracts, PDVSA could choose to deposit payments in bolivars in Venezuelan banks whenever, in its

"exclusive discretion" and "judgment," it "deem[ed] it discretionally convenient." Compl. ¶¶ 78, 85, 82.

This case presents facts akin to those we examined in *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1144 (D.C. Cir. 1994), in which an Iraqi bank failed to pay on letters of credit, and the payee claimed that the bank's prior payments from its accounts in the United States constituted a direct effect. We rejected this contention because pursuant to the letters of credit, Iraq "might well have paid from funds in United States banks but it might just as well have done so from accounts located outside of the United States." *Id.* at 1146-47 Such unlimited discretion, we concluded, meant that unlike in *Weltover*, no money was "'supposed' to have been paid" in the United States. *Id.* at 1146 (quoting *Weltover*, 504 U.S. at 608). In other words, where, as here, the alleged effect depends solely on a foreign government's discretion, we cannot say that it "flows in a straight line without deviation or interruption." *Princz*, 26 F.3d at 1172.

Finally, relying on *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995), H&P-V contends that PDVSA's breach halted a flow of commerce between Venezuela and the United States, thus causing a direct effect. McKesson, an American corporation, alleged that the Iranian government had illegally divested it of its investment in a dairy located in Iran. *Foremost-*

McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 441 (D.C. Cir. 1990). In doing so, we concluded, Iran halted a "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of [the dairy]," thereby causing a direct effect. *Id.* at 451. H&P-V insists that the same is true here. We think not. Iran's actions in "freezing-out American corporations in their ownership of [the dairy]" had the direct and immediate effect of halting a flow of resources and capital between the United States and Iran. *Id.* By contrast, any interruptions in commerce between the United States and PDVSA flowed immediately not from PDVSA's breach of contract, but rather from Helmerich & Payne's decision to cease business in Venezuela. And, given that the contracts were for set periods of time ranging from five months to one year, there was no guarantee of future business between Helmerich & Payne and PDVSA beyond those contracts.

III

We affirm the district court's denial of Venezuela's motion to dismiss H&P-IDC's expropriation claim. In all other respects, we reverse and remand for further proceedings consistent with this opinion.

So ordered.

SENTELLE, *Senior Circuit Judge*, dissenting in part and concurring in part: I will not reiterate the facts in this controversy, as the careful opinion of the majority sets them forth in necessary detail and with inerrant accuracy. Further, I fully concur in the majority's discussion and conclusion concerning the issues related to the commercial activity exception set forth in 28 U.S.C. § 1605(a)(2). However, despite my general agreement with the majority's exposition of the facts underlying the claim for expropriation, I dissent from the conclusion that those facts bring this case within the expropriation exception set forth in 28 U.S.C. § 1605(a)(3).

As the majority recognizes, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604, *et. seq.*, "'establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state.'" Maj. Op. at 8 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992)). As the majority further recognizes, "[t]he Act provides that 'a foreign state *shall* be immune from the jurisdiction of the courts of the United States and of the States.'" Maj. Op. at 8 (emphasis in original) (quoting 28 U.S.C. § 1604). Therefore, unless the expropriation claim falls within one of the exceptions set forth in 28 U.S.C. §§ 1605-07, the district court, and derivatively this court, has no jurisdiction over the claim. The majority concludes

that claim falls within the exception created by § 1605(a)(3). I disagree.

That exception permits the courts of the United States to exercise jurisdiction "in any case in which rights in property taken *in violation of international law* are in issue." § 1605(a)(3) (emphasis added). The majority states, Venezuela argues that "as a Venezuelan national, H&P-V may not claim a taking in violation of *international* law." Maj. Op. at 8 (emphasis in original). Further, "under generally applicable corporate law principles, H&P-IDC has no 'rights in property' belonging to its subsidiary and thus lacks standing," to bring this action. Maj. Op. at 8. I again look to the majority's statement of the facts which acknowledges: "All [parties] agree that for purposes of international law, 'a corporation has the nationality of the state under the laws of which the corporation is organized.'" Maj. Op. at 9 (quoting Restatement (Third) of Foreign Relations Law § 213 (1987)).

The majority further recognizes "that generally, a foreign sovereign's expropriation of its own national's property does not violate international law." Maj. Op. at 9 (citing *United States v. Belmont*, 301 U.S. 324, 332 (1937)). This principle is known as the domestic takings rule, which provides that "[w]hat another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial

consideration here. Such nationals must look to their own government for any redress to which they may be entitled." *Belmont*, 301 U.S. at 332.

Like the majority, I recognize that Venezuela's position in this litigation is that

> the domestic takings rule ends this case because H&P-V, as a Venezuelan national, may not seek redress in an American court for wrongs suffered in its home country. This argument has a good deal of appeal. Having freely chosen to incorporate under Venezuelan law, H&P-V operated in that country for many years and reaped the benefits of its choice, including several extremely lucrative contracts with the Venezuelan government. Given this, and especially given that H&P-V expressly agreed that these contracts would be governed by Venezuelan law in Venezuelan courts, one might conclude that H&P-V should live with the consequences of its bargain.

Maj. Op. at 10. Unlike the majority, I believe that Venezuela's position is well taken. When appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law. To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate

Venezuela's sovereignty, the value protected by the FSIA.

The majority supports its extended examination with the decision in *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962). While that case may stand for the proposition that the courts of the United States can examine the fairness of a foreign sovereign's expropriation, I cannot join the majority's conclusion that "*Sabbatino* remains good law." Maj. Op. at 12. Perhaps *Sabbatino* is good law in the Second Circuit, but we are not bound by the decisions of other circuits, and I do not conclude that *Sabbatino* has ever been or remains good law in the District of Columbia Circuit. I would, therefore, conclude that Venezuela's reliance on the domestic takings rule is well taken and should compel the dismissal of Helmerich & Payne's expropriation claim for want of jurisdiction.

I would further note that I differ with the majority's apparent belief that Venezuela's reliance upon *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), is misplaced. *See* Maj. Op. at 14. The majority asserts that "[c]ontrary to Venezuela's assertion, *Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA." *Id.* While this may be literally accurate, it is at least equally accurate that neither *Dole Food* nor any other case constitutes a wholesale rejection of corporate law As both the majority's opinion and

mine have recognized, shareholders ordinarily have no standing to assert claims on behalf of a corporation for its property.

Neither do I find compelling the majority's reliance on two cases from this circuit: *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008), and *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1517 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985). *Chabad* is authority, at most, for the proposition that "Mil an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" Maj. Op. at 9 (quoting *Chabad*, 528 F.3d at 942) (emphasis in original). As the plaintiff here has, by reason of the domestic takings rule, failed to plead a "taking in *violation of international law*," *Chabad* supports rather than undermines Venezuela's motion for dismissal. 528 F.3d at 943 (emphasis added). *Ramirez* warrants no separate discussion.

I would note first that the judgment in *Ramirez* was vacated by the Supreme Court. *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985). As the majority states,

> we have held that, "[w]hen the Supreme Court vacates a judgment of this court

> without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (quoting *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991)).

Maj. Op. at 16. For what it's worth, I question whether the language quoted from *Adewani and Action Alliance* in fact states a *holding* of this court to the effect that we are *bound* by the reasoning of vacated opinions. Rather, each instance paraphrases language of Justice Powell quoted in a parenthetical following the quoted language from *Action Alliance*. *Action Alliance* parenthetically quoted Justice Powell as stating:

> Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law

County of Los Angeles v. Davis, 440 U.S. 625, 646 n.10 (Powell, J., dissenting) (quoted in *Action*

Alliance, 930 F.2d at 83-84). In other words, the prior reasoning of the court in vacated opinions may be persuasive, even powerfully persuasive, but I question whether it is binding precedent.

Be that as it may, *Ramirez* is not genuinely on point. *Ramirez* dealt with the question of whether the shareholders of a corporation ousted by acts of the United States government had a property interest warranting due process protection under the Constitution. The *Ramirez* Court had no occasion to consider whether the statutory waiver of a foreign government's sovereign immunity encompasses the sort of second degree property interest protected against invasion by our government under the due process concepts of our Constitution.

APPENDIX B—District Court's Memorandum Opinion (Sept. 20, 2013)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 11-cv-1735 (RLW)

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND
HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A., AND
PDVSA PETRÓLEO, S.A.,

Defendants.

MEMORANDUM OPINION

I. INTRODUCTION

This case involves a longstanding and apparently formerly productive contractual relationship that

has since broken down. Although Defendants filed motions to dismiss, subsequent to the filing of those motions all parties asked, and this Court agreed, to hold those motions in abeyance so as to first answer four questions central to the disposition of the motions. This Memorandum Opinion addresses those four questions, along with a motion filed by Plaintiffs asking the Court to "enforce" the parties' Joint Stipulation regarding the handling of the four questions. As detailed below, the Court's answers to the questions, and the resolution of Plaintiffs' motion, do not fully resolve the motions to dismiss, and therefore additional briefing will be necessary on the remaining arguments raised in Defendants' motions.

II. FACTUAL SUMMARY

A. Issue Background[1]

Helmerich & Payne International Drilling Co. (H&P-IDC) is a Delaware-incorporated, Tulsa, Oklahoma-based corporation that wholly owns the

---

[1] Unless specifically noted otherwise, this summary is based on facts alleged in Plaintiffs' Complaint, which are presumed true. (*See* Dkt. No. 34, at 3 ("The parties stipulate that they shall rely on no factual evidence, apart from the allegations of the complaint and documents referenced therein, and no arguments based upon such evidence, in connection with the resolution of the Initial Issues.")).

subsidiary Helmerich & Payne de Venezuela, C.A. (H&P-V) (collectively, Plaintiffs). (Dkt. No. 1, ¶¶ 2, 9). H&P-V "is incorporated in Venezuela," and "had its principal Venezuelan office in Anaco, Venezuela . " (*Id.* ¶ 10). Plaintiffs are oil and gas drilling companies. (*Id.* ¶¶ 9-10). H&P-V began providing contract oil and gas drilling services in Venezuela in the 1970s; H&P-IDC had been operating in Venezuela through wholly-owned subsidiaries since 1954. (*See id.* ¶ 16). Venezuela's Superintendent of Foreign Investment, which is part of the country's Finance Ministry, issued H&P-V a Company Qualification Certificate stating the company "is considered a FOREIGN COMPANY at all relevant legal effects." (*Id.* ¶¶ 100, 102) (capitalization in original).

There are three Defendants in this case. One is the Bolivarian Republic of Venezuela (Venezuela), which of course is a country on the northern coast of South America. The other two are entities owned and controlled by Venezuela: Petróleos de Venezuela, S.A. (PDVSA) and PDVSA Petróleo, S.A. (Petróleo). (*See id.* ¶ 2). PDVSA and Petróleo are energy corporations "that by law enjoy a monopoly on Venezuela's oil reserves." (*Id.*). Petróleo, a wholly owned subsidiary of PDVSA, is the exploration and operating arm of PDVSA. (*Id.* ¶ 13). The PDVSA Defendants concede they are agencies or instrumentalities of Venezuela, as that term is

defined at 28 U.S.C. § 1603(b). (*See* Dkt. No. 22-1, at 13).

Beginning around 1997, H&P-V provided contract drilling services exclusively to the PDVSA Defendants and other entities owned by Venezuela. (*See* Dkt. No. 1, ¶ 2). H&P-V and Petróleo signed each contract. (*See id.* ¶¶ 30, 32). This work involved, among other things, "the largest, most powerful, and deepest-drilling, land-based drilling rigs available." (*Id.* ¶¶ 21, 26). At issue in this litigation are ten "fixed term" drilling contracts signed in 2007 to be performed by H&P-V on a "day-rate" basis. (*Id.* ¶¶ 30, 33-35). "The agreed-upon daily rates for H&P-V . were partially set forth in U.S. Dollars and partially in Venezuelan currency ('Bolivars' or 'Bolivar Fuertes')." (*Id.* ¶ 37) (footnote omitted). "H&P-V separately invoiced the amounts due in U.S. Dollars ('Dollar-based invoices') and the amounts due in Venezuelan currency ('Bolivar-based invoices')." (*Id.* ¶ 38).

Of the ten contracts, one related to drilling in the western region of Venezuela, and the rest related to drilling in the eastern region. (*Id.* ¶¶ 39-40). The former contract required the Dollar-based invoices to be paid "in U.S. Dollars in the United States" under

certain conditions. (Dkt. No. 40-3, at 21-22 (§ 18.14)).[2]

---

[2] Specifically, the western drilling contract provides at § 18.14 that:

> "If as a result of the exchange control measures established by the competent authorities, [H&P-V] is unable to obtain in a timely fashion the foreign currency required to perform its obligations abroad related to the performance of this CONTRACT, [Petróleo] agrees to pay in United States dollars the portion of the price of this CONTRACT set in said currency, in accordance with current regulation, "Norms and Procedures for the Payment of Foreign Exchange for Construction, Goods and Services in the Western Division," for those items directly associated with the external component pursuant to the results of the corresponding audit. [H&P-V] shall indicate, for purposes of payment, the bank and account number where payments are to be made. [H&P-V] agrees:
>
> a) That the deposits made by [Petróleo] in the referenced accounts will release [Petróleo] from its obligation to pay the portion of the price set in United States Dollars to the extent of the deposits made.
>
> b) That it will not request from the commercial bank or other foreign exchange operators the acquisition of foreign currency corresponding to the amounts deposited by [Petróleo] in the aforementioned account; and that if it should do so, it will immediately return to [Petróleo], in dollars, the amounts that it would have deposited.

The remaining nine contracts "were supplemented" by a 2008 agreement signed by H&P-V and PDVSA, (Dkt. No. 1, In 40-41), that required the PDVSA Defendants to pay "invoices issued [by H&P-V] corresponding to the contract's foreign currency component in actual dollars at 61% abroad in the [Tulsa, Oklahoma] account specified by [H&P-V]," while "the remaining portion, 39%, shall be paid in equivalent bolivars at the official exchange rate," (Dkt. No. 40-7, at 2 (¶¶ 1-2). "This 2008 agreement reiterated the terms of an earlier 2003 agreement, which similarly provided for a set percentage of the PSVSA Defendants' payments to be remitted in U.S. Dollars to a bank account in the United States." (Dkt. No. 1, ¶ 118). "Thus, under each of the contracts at issue, the PDVSA Defendants were required to make payments to H&P-V in U.S. Dollars directly to H&P-V's

---

c) That the payment in U.S. dollars, as set forth in this section, is of a temporary nature and, consequently, [Petróleo] may pay the portion of the price established in US dollars in Bolivars, at the exchange rate in effect at the place and time of payment, when, in [Petróleo]'s judgment, the grounds that gave rise to this form of temporary payment have ceased. In no case shall [Petróleo] recognize expenses for commissions and/or transfers that [H&P-V] may incur for purchasing foreign exchange."

designated bank account at the Bank of Oklahoma in Tulsa, Oklahoma." (*Id.* ¶ 43).

Around 2007,[3] the PDVSA Defendants "began systematically to breach those contracts" in an amount that eventually amounted to over $32 million in unpaid invoices. (*See id.* ¶¶ 6, 56). In January 2009, H&P, Inc., the parent company of H&P-IDC, (*id.* ¶ 9), "announced it would 'cease[] operations on rigs as their drilling contracts expire' and not renew its subsidiary's contracts with the PDVSA Defendants absent an 'improvement in receivable collections,' (*id.* ¶ 50). By November 2009, H&P-V had finished its contractually-obligated work and disassembled its equipment. (*See id.* ¶ 53). In 2010, the PDVSA Defendants stopped making payments altogether. (*Id.* ¶¶ 44, 56). Prior to that, they "made at least 55 payments totaling roughly $65 million into H&P-V's designated bank account in Tulsa," in addition to payments made in Bolivars. (*See id.* ¶ 44). The PDVSA Defendants and Plaintiffs met in Houston on May 24, 2010, in an attempt to work out a solution, but were unsuccessful. (*See id.* ¶ 55).

---

[3] The Complaint states both that "[s]tarting in 2007" the PDVSA Defendants "fell substantially behind in their payments to H&P-V," (Dkt. No. 1, ¶ 46), and that they "began" to breach the contracts at issue "in late 2008 and 2009," (*id.* ¶ 6).

Between June 12 and 14, 2010, the PDVSA Defendants, with assistance from the Venezuelan National Guard, "surrounded and unlawfully blockaded" H&P-V's business premises in western and eastern Venezuela. (*Id.* ¶ 3). "PDVSA's Director of Services expressly informed H&P-V's Administrative Manager that Defendants intended the blockade to prevent H&P-V from removing its rigs and other assets from its premises, and to force H&P-V to negotiate new contract terms immediately." (*Id.* ¶ 63). On June 23, 2010, PDVSA issued a press release stating they had nationalized eleven drilling rigs belonging to "Helmerich & Payne (HP), a U.S. transnational firm." (*Id.* ¶ 65). Two days later, PDVSA issued another press release, which referred to "[t]he nationalization of the oil production drilling rigs from the American contractor H&P " (*Id.* ¶ 66).

On June 29, 2010, the Venezuelan National Assembly issued a Bill of Agreement declaring H&P-V's property to be of public interest, and recommended to then President Hugo Chavez that he issue a Decree of Expropriation. (*Id.* ¶¶ 3-4). That day, President Chavez issued Presidential Decree No. 7532, directing PDVSA "or its designee affiliate" to seize H&P-V's property. (*See id.* ¶ 4). Also on that same day, the PDVSA Defendants hired a notary to "conduct a judicial inspection of the rigs and other assets" in the eastern (but not western) region of Venezuela. (*Id.* ¶ 71). "H&P-V hired a

notary to accompany the PDVSA Defendants' notary; H&P-V's notary simultaneously performed a rushed and incomplete inspection in the limited time available that day." (*Id.*). The property encompasses more than just the drilling rigs, including, for example, real property, vehicles, and various equipment. (*See id.* ¶¶ 77-80). At some time after that, Minister Ramirez, Venezuela's Minister of Energy and Petroleum and also President of PDVSA, spoke in eastern Venezuela at what had been H&P-V's premises there about the seizure, referring to H&P-V as an "American company" with "foreign gentlemen investors" that would now "become part of the payroll" of PDVSA. (*Id.* ¶ 5). On July 1, 2010, Petróleo filed two eminent domain proceedings in Venezuela, one in the eastern region and one in the western. (*Id.* ¶¶ 72-73). In the former, as of September 2011, "H&P-V still has not been afforded the opportunity to appear," and in the latter "those proceedings have not progressed past the earliest stage of the case." (*Id.*). Plaintiffs have received no compensation from Venezuela with respect to the seizure of their drilling rigs and related items. (*Id.* ¶ 86).

B. Procedural Background

Plaintiffs filed their Complaint in September 2011 against Defendants under two provisions of the Foreign Sovereign Immunities Act (FSIA): the

commercial activities exception [4] and the expropriation exception.[5] (*Id.* ¶ 1). The Complaint states two counts:

> Taking in Violation of International Law, and Breach of Contract. In three briefs filed separately on August 31, 2012—two by Venezuela, and one by the PDVSA entities—Defendants moved to dismiss. (Dkt. Nos. 22-24). Before opposing the motions to dismiss, Plaintiffs filed a motion to compel

---

[4] 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.").

[5] 28 U.S.C. § 1605(a)(3) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.").

discovery, (Dkt. No. 29), which was fully briefed but ultimately denied without prejudice because the parties instead agreed to a Joint Stipulation, (*see* Dkt. No. 36).

The Joint Stipulation lists four issues raised in the motions to dismiss, termed the "Initial Issues," that the parties "shall brief in their next round of briefing and reserve argument on the additional issues raised in the motions to dismiss " (Dkt. No. 36, at 3). The four Initial Issues are:

> (A) Whether, for purposes of determining whether a 'taking in violation of international law' has occurred under the expropriation exception of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(3), Plaintiff Helmerich & Payne de Venezuela C.A. is a national of Venezuela under international law;
>
> (B) Whether Plaintiffs' expropriation claims are barred by the act of state doctrine, including the issue whether this defense may be adjudicated prior to the resolution of Defendants' challenges to the Court's subject matter jurisdiction;
>
> (C) Whether, for purposes of determining the applicability of the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), Plaintiffs have sufficiently alleged a 'direct

> effect' in the United States within the meaning of that provision; and
>
> (D) Whether Plaintiff Helmerich & Payne International Drilling Co. has standing.

(*Id.* at 3). The Joint Stipulation states that these four issues "shall be adjudicated solely on the basis of the Plaintiffs' allegations (including the materials attached as exhibits or referenced in the complaint), assuming the truth of all well-pleaded factual allegations in the complaint, and construing the complaint in the light most favorable to Plaintiffs." (*Id.* at 2-3). It also states the following: "The parties stipulate that Plaintiffs shall brief the Initial Issues in their next round of briefing and reserve argument on the additional issues raised in the motions to dismiss (the ownership or operation of the expropriated assets, application and enforceability of what Defendants refer to as a forum selection clause, and *forum non conveniens* (hereafter 'Additional Issues')) until a second phase of briefing on the motions to dismiss." (*Id.* at 3).

Following the agreement on the Joint Stipulation, the parties completed the briefing on the motions to dismiss. Shortly thereafter, Plaintiffs filed a motion to enforce the Joint Stipulation, claiming that the PDVSA Defendants violated the Joint Stipulation by arguing "that the Court cannot exercise personal jurisdiction over the PDVSA Defendants consistent with constitutional due process," which Plaintiffs

state is not among the four Initial Issues. (*See* Dkt. No. 45, at 3). Plaintiffs ask that portions of the PDVSA Defendants' Reply that "contain the constitutional due process argument" be stricken. (*See id.* at 5-6). In their Opposition to the motion to enforce, the PDVSA Defendants argue that "a due process analysis is directly related to a determination of direct effect because the FSIA's commercial activity exception cannot grant personal jurisdiction where the Constitution forbids it." (Dkt. No. 46, at 9).

III. ANALYSIS OF INITIAL ISSUES

The Court will address the four Initial Issues in the order they appear in the parties' Joint Stipulation. In addition, as part of answering the question regarding whether the Plaintiffs have sufficiently alleged a direct effect under the relevant FSIA provision, the Court will resolve Plaintiffs' motion to enforce.

A. Corporate Nationality of H&P-V

Listed first among the four Initial Issues is the question of whether H&P-V is considered a national of Venezuela under international law for the purpose of determining if a taking in violation of international law occurred under the expropriation exception of the FSIA. Based on the weight of authority reviewed below, this Court concludes that

H&P-V is considered a national of Venezuela under international law.

1. Standard of Review

International law is based on, among other sources, international conventions, principles of law recognized by civilized nations, judicial opinions, and reputable scholarship. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 36-37 n.23 (D.C. Cir. 2011) (citations omitted). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (the RESTATEMENT) § 103(2) (1987) ("In determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; [and] (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states."). In the absence of an applicable treaty or controlling federal precedent, "resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

2. Analysis of Relevant Authority

Because no treaty controls the determination of H&P-V's nationality, the Court must examine the sources referenced by the RESTATEMENT § 103(2) to identify statements by authorities on international law in this area. A review of key sources from both the international and national arenas, and an analysis of their application to this case, follows.

a. International Sources

For several decades, the general practice in international law has been to consider a corporation a national of the country of its incorporation. This stems in no small part from the decision of the International Court of Justice (ICJ) in *Case Concerning the Barcelona Traction, Light and Power Co.* (*Belg. v. Spain*) 1970 I.C.J. 3 (Feb. 5) (*Barcelona Traction*). In *Barcelona Traction*, the ICJ stated that "[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments." *Id.* ¶ 70. The case also later refers to "the general rule that the right of diplomatic protection of a company belongs to its national State " *Id.* ¶ 93. The case has been and remains "widely viewed not only as an accurate statement of the law on diplomatic protection of corporations but a true reflection of

customary international law." *See* U.N. Int'l L. Comm'n, Fourth Report on Diplomatic Protection, U.N. Doc. A/CN.4/530, at 11 (Mar. 13, 2003), *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_530.pdf.

The ICJ recently revisited *Barcelona Traction* and substantially affirmed its earlier decision. *See Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) 2007 I.C.J. 582 (May 24) (*Diallo*). In *Diallo*, the ICJ stated that since *Barcelona Traction* "the Court has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule that the right of diplomatic protection of a company belongs to its national State, which allows for protection of the shareholders by their own national State by substitution, and on the reach of any such exception." *Id.* ¶ 87 (quotation marks and citations to *Barcelona Traction* omitted). Given the opportunity to create such an exception, the ICJ in *Diallo*, after "having carefully examined State practice and decisions of international courts and tribunals," declined to do so, finding that the universe of sources examined did not reveal, "at least at the present time," such an exception. *See id.* ¶ 89.

In *Diallo*, the ICJ also stated it was "bound to note that, in contemporary international law, the protection of the rights of companies and the rights

of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the International Centre for Settlement of Investment Disputes (ICSID) " *Id.* ¶ 88. A recent pronouncement from the ICSID on corporate nationality, then, is instructive. In *Tokios Tokelès v. Ukraine*, the ICSID issued a Decision on Jurisdiction. Case No. ARB/02/18 (Apr. 29, 2004).[6] That decision states that "reference to the state of incorporation is the most common method of defining the nationality of business entities under modern [Bilateral Investment Treaties] and traditional international law." *Id.* ¶ 63 (citing Christoph H. Schreuer, *The ICSID Convention: A Commentary*, at 277 (2001)). The ICSID approvingly cites to *Barcelona Traction*, calling it "the predominant approach in international law." *Id.* ¶ 70. And the ICSID also cites to a treatise that similarly notes that "it is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its *siege social* to be in the same state."

---

[6] The decision is available at the following cumbersome url: https://icsid.worldbank.org/IC SID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC639_En&caseId=C220.

1 OPPENHEIM'S INTERNATIONAL LAW 859-60 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed. 1996) (footnote omitted).

Given that H&P-V was incorporated in Venezuela and had multiple offices there, including its principal office in Anaco, a review of relevant international sources indicates that the company is to be considered a national of Venezuela. With that in mind, the Court now turns to national sources to confirm this understanding.

b. National Sources

The RESTATEMENT is published by the American Law Institute, an organization that includes "judges, legal academicians, and lawyers in independent private practice, in government, and in law departments of business and other enterprises." *See* RESTATEMENT at XI. The most recent version of the RESTATEMENT takes a clear position on corporate nationality in international law: "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized." *Id.* § 213. The comments to § 213 support this clear statement, noting that "[t]he traditional rule stated in this section, adopted for certainty and convenience, treats every corporation as a national of the state under the laws of which it was created." *Id. cmt.* c. *See also id. cmt.* d. ("[A] corporation has the nationality of the state that created it "). The RESTATEMENT cites

approvingly to *Barcelona Traction*, noting that the case "gave preference to the state of incorporation over a state with other significant links, in representing a company against a third state." *Id.* Reporters' Notes No. 3. It also rejects the suggestion that the place of the *siege social* can be an alternative basis for corporate nationality under international law, instead finding that "Mil practical effect it is an additional requirement, since jurisdictions using that standard require that a firm be incorporated in the state where it has its *siege.*" *Id. cmt.* c.

The Supreme Court has cited to § 213 of the RESTATEMENT, and the parties dispute the significance of that citation to this case. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91-92 (2002). Had the Supreme Court clearly held in *JPMorgan* that the state of incorporation is the definitive test of nationality, that would of course be the end of the analysis. But that was not the case. Nonetheless, because the case is important and neither Plaintiffs nor Defendants squarely address its significance to these facts, a brief word on the case is warranted.

Defendants slightly overstate the import of *JPMorgan*. According to the PDVSA Defendants, "[t]he Supreme Court has held that '[f]or purposes of international law, a corporation has the nationality of the state under the laws of which the corporation

is organized.'" (Dkt. No. 22-1, at 22-23) (quoting *JPMorgan*, 536 U.S. at 91-92 (in turn quoting the RESTATEMENT § 213)). Similarly, Venezuela claims that in *JPMorgan* the Supreme Court "has held" that "a corporation has the nationality of the state under the laws of which the corporation is organized." (Dkt. No. 44, at 10) (citation omitted). But there are several indications that what Defendants claim is a holding of the Supreme Court is not actually so. One is that the quote from the RESTATEMENT was used as a parenthetical following a *"Cf."* cite, and the quote is never discussed or analyzed. Another is that *JPMorgan* is not a case applying international law—hence, the *"Cf."* cite—but was rather constructing a rule for corporate nationality under domestic law. *See* 536 U.S. at 98-99 ("[O]ur jurisdictional concern here is with the meaning of 'citizen' and 'subject' as those terms are used in [28 U.S.C.] § 1332(a)(2).") (brackets and internal citation omitted). Thus, there is no clear holding from the Supreme Court in *JPMorgan* on the issue of corporate nationality under international law or the FSIA.

But that does not mean that Plaintiffs are correct when they state *JPMorgan* "has no bearing whatsoever on international law governing expropriations." (Dkt. No. 39, at 38 n.22).[7] As our

---

[7] Plaintiffs' Opposition appears to only address *JPMorgan* in this footnote. According to their Table of Authorities, the

Court of Appeals has explained, "[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (citation omitted). Perhaps the Supreme Court's passing citation to the RESTATEMENT fails to meet this standard, nonetheless the Court's imprimatur of this RESTATEMENT provision carries considerable force.

Other United States courts, in line with the RESTATEMENT, have concluded that a corporation's nationality is determined by its state of incorporation. For example, in *Rong v. Liaoning Provincial Government*, 362 F. Supp. 2d 83 (D.D.C. 2005), *aff'd on other grounds*, 452 F.3d 883 (D.C. Cir. 2006), Broadsino, an entity incorporated in Hong Kong, claimed that its property was expropriated by China. Plaintiffs in *Rong* argued that Broadsino should not be determined to be a national of China based in part on the fact that there had previously been an agreement that Hong Kong corporations would be considered foreign nationals with respect to China. *See* 362 F. Supp. 2d at 101. Judge Walton rejected this argument and looked to the state of incorporation to determine nationality. "[B]ecause Broadsino is a corporation organized under the laws of Hong Kong, [China]'s actions did not contravene

---

case appears once on page 30, (Dkt. No. 39, at 5), but the Court sees no mention of the case there.

international law. [E]xpropriation by a sovereign state of the property of its own national does not implicate settled principles of international law." *Id.* at 101-02. And recently in *Best Medical Belgium, Inc. v. Kingdom of Belgium*, 913 F. Supp. 2d 230 (E.D. Va. 2012), an American company with "a controlling share" of a Belgian subsidiary challenged an alleged expropriation by the Belgian government. *Id.* at 234. The court in that case found no violation of international law, holding that the subsidiary was a Belgian national. *Id.* at 239-40.

On the other side of the ledger, so to speak, from the ICJ, ICSID, RESTATEMENT, U.S. Supreme Court, and other courts, Plaintiffs point to one case from the Second Circuit—Banco *Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962) (*Sabbatino*), *rev'd on other grounds*, 376 U.S. 398 (1964); *see also Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 168 (2d Cir. 1967) (a continuing part of the "much-discussed previous [*Sabbatino*] opinions"). There is no doubt *Sabbatino* is a useful case for Plaintiffs. In that case, the Second Circuit disregarded the nationality of the corporation where it was different from the nationality of most of the corporation's shareholders. 307 F.2d at 861. The court stated that "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only

to the 'nationality' of the corporate fiction." *Id.* Plaintiffs claim that *Sabbatino* is a "seminal" case. (Dkt. No. 39, at 33). However, if the case were truly seminal, it would have strongly influenced later developments, yet it appears that *Sabbatino's* proposition that a corporation's state of incorporation can be ignored has never been followed by any court in the United States. Plaintiffs point to none, and this Court has found none.

3. Conclusion

Although Plaintiffs are not without any support in arguing that H&P-V is not a national of Venezuela under international law, the holding of the Second Circuit in *Sabbatino* is overwhelmed by authorities including cases from the International Court of Justice, a Decision on Jurisdiction from the International Center for the Settlement of Investment Disputes, other decisions from U.S. courts, and treatises (including one endorsed by the Supreme Court). The weight of authority therefore leads to the conclusion that H&P-V is considered a national of Venezuela under international law.

B. Act of State doctrine

The second of the parties' Initial Issues is whether the act of state doctrine bars Plaintiffs' expropriation claims. As part of that inquiry, the Court must determine "whether this defense may be

adjudicated prior to the resolution of Defendants' challenges to the Court's subject matter jurisdiction." (Dkt. No. 36, at 3). Because this Court must first determine it has jurisdiction before considering an act of state defense, the time is not yet ripe for resolving whether the act of state doctrine bars Plaintiffs' expropriation claims.

1. Background on the act of state doctrine

The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). This doctrine "is applicable when 'the relief sought or the defense interposed would require a court in the United States to declare invalid the official act of a foreign sovereign performed within' its boundaries." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (internal brackets omitted) (quoting *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990)). The doctrine is to be interpreted and applied in accordance with the policy interests of "international comity, respect for the sovereignty of other nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *W.S. Kirkpatrick*, 493 U.S. at 408;

Nemariam v. Fed. Democratic Republic of Ethiopia, 491 F.3d 470, 477 n.7 (D.C. Cir. 2007). However, the party raising the defense bears the burden to affirmatively show that an act of state has occurred and "that no bar to the doctrine is applicable under the factual circumstances." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1534 (D.C. Cir. 1984) (en banc), *judgment vacated on other grounds*, 471 U.S. 1113 (1985).

The Second Hickenlooper Amendment is an exception to the act of state doctrine. *See* 22 U.S.C. § 2370(e)(2). Through this Amendment, Congress legislatively overruled *Sabbatino* so that the act of state doctrine would not preclude adjudication of an expropriation claim where the court has jurisdiction to hear it. *See Nemariam*, 491 F.3d at 477 n.8 ("Through the Hickenlooper Amendment, 'Congress . adopted a specific statutory provision requiring federal courts to examine the merits of controversies involving expropriation claims. [It] overrides the judicially developed doctrine of act of state.') (quoting *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 829 (9th Cir. 1987)). Specifically, the Amendment bars application of the doctrine where there is: "[(1)] a claim of title or other right to property asserted by any party including a foreign state (or a party claiming through such state); [(2)] based upon (or traced through) a confiscation or other taking after January 1, 1959; [(3)] by an act of

state in violation of the principles of international law " 22 U.S.C. § 2370(e)(2).

2. Jurisdictional considerations

"Federal courts are courts of limited jurisdiction." *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (citation omitted). Jurisdiction is "the first and fundamental question" federal courts must ask when overseeing any case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Thus, there is a threshold duty vested in every court to resolve jurisdictional disputes prior to any ruling on the merits. *See Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999).

Because "there is no unyielding jurisdictional hierarchy," *Ruhrgas A.G. v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999), district courts have the discretion to resequence jurisdictional questions, *United States v. Johnson*, 254 F.3d 279, 287 n.11 (D.C. Cir. 2001); *see also Galvan*, 199 F.3d at 463 (resolving a sovereign immunity challenge before subject-matter jurisdiction, holding "[s]overeign immunity questions clearly belong among the non-merits decisions that courts may address even where subject-matter jurisdiction is uncertain [because] the Supreme Court has characterized the defense as jurisdictional") (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)); *cf. Ruhrgas AG*, 526 U.S. at 586 (expressly allowing adjudication of challenges to personal jurisdiction prior to subject-matter

jurisdiction where "concerns of judicial economy and restraint are overriding").

In short, district courts cannot resolve a merits defense prior to resolving a challenge to subject-matter jurisdiction. *See Steel Co.*, 523 U.S. at 94.

3. Application of jurisdictional considerations to the act of state doctrine

The act of state doctrine goes to the merits, and is not a jurisdictional defense. *See Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits."). This Circuit has repeatedly recognized the act of state doctrine as a merits defense requiring prior resolution of jurisdictional questions. *See, e.g.*, *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 (D.C. Cir. 2002) ("[J]urisdiction must be resolved before applying the act of state doctrine, because that doctrine is 'a substantive rule of law.") (quoting *In re Papandreou*, 139 F.3d 247, 256 (D.C. Cir. 1998)) (footnote omitted); *Marra v. Papandreou*, 216 F.3d 1119, 1122 (D.C. Cir. 2000) (reaffirming *In re Papandreou's* holding that while standing, personal jurisdiction, and forum non conveniens are jurisdictional issues, the act of state doctrine is not); *In re Papandreou*, 139 F.3d at 256 ("[W]e note that

the Supreme Court has authoritatively classified the act of state doctrine as a substantive rule of law. Accordingly, resolution of the case on this ground, before addressing the FSIA jurisdictional issue, would exceed the district court's power.") (citations omitted). This Circuit's sequencing rule requires consideration of whether subject-matter jurisdiction exists under the FSIA before deciding whether to dismiss the case under the act of state doctrine. Therefore the determination of whether the act of state doctrine applies to the facts of this case must wait.

C. The Direct Effect test

The third of the Initial Issues is "[w]hether, for purposes of determining the applicability of the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), Plaintiffs have sufficiently alleged a 'direct effect' in the United States within the meaning of that provision." (*See* Dkt. No. 36 ¶ 1). The Circuits are divided on how direct a "direct effect" must be since the Supreme Court's only case interpreting the relevant FSIA language. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). But based on a review of the developments in this area, particularly in this Circuit, Plaintiffs have sufficiently stated a direct effect under the FSIA's commercial activities exception.

1. Standard of Review

As the Supreme Court has explained, "the FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The Act provides that foreign states are immune from the jurisdiction of both federal and state courts, subject to those specific exceptions embedded within the statute providing otherwise. *See* 28 U.S.C. §§ 1604-07 In a suit brought against a foreign state, a district court must decide, as a threshold question, whether any of the FSIA exceptions apply. *See Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1983).

Section 1605(a)(2) of the FSIA describes an exception to the presumption of foreign sovereign immunity where "the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Therefore, the parties' Joint Stipulation, requesting that the Court decide whether Plaintiffs have sufficiently alleged a direct effect in the United States, operates as an incremental and narrowly-tailored facial challenge to the Court's jurisdiction. Federal jurisdictional pleading standards apply accordingly. *See* FED R. CIV. P. 12(b)(1).

The same standards that apply to a Rule 12(b)(6) motion to dismiss apply where the defendant raises a facial challenge to the court's jurisdiction on the pleadings. *See Muscogee Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010) (construing defendants' challenge to jurisdiction as facial and therefore "apply[ing] the same standards under Rule 12(b)(1) that are applicable to a Rule 12(b)(6) motion to dismiss for failure to state a cause of action."); *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) ("When a defendant makes a facial challenge to subject matter jurisdiction, the plaintiff, in effect, is afforded the same procedural protections as he would receive under a Rule 12(b)(6) consideration."); *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007) ("Pursuant to Rule 12(b)(1), the Court must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the nonmoving party.").

Applying a Rule 12(b)(6) level of review means "[a] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *Iqbal*'s plausibility determination is a "context-specific task" requiring a level of factual explication commensurate with the nature of the claim. *Id.* at 679. Rule 12(b)(1) motions in particular require "the plaintiff [to]

assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right.' *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 244 (3d Cir. 2012) (quoting *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007)).

For an effect to be "direct" under the FSIA's commercial activities exception, Plaintiffs must adequately allege that the effect "follows as an immediate consequence of the defendant's activity." *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (citation, internal quotations, and ellipses omitted); *see also Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). While jurisdiction may not be predicated on "purely trivial effects," the effect need not be substantial or foreseeable. *See Weltover*, 504 U.S. at 618; *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661, 664 (D.C. Cir. 2010) (citing *Princz*, 26 F.3d at 1172).

If Plaintiffs have alleged facts sufficient to fairly infer that Defendants "promised [and failed] to perform specific obligations in the United States," then the "direct effect" requirement is satisfied. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 600-01 (D.C. Cir. 2013) (citing *Weltover*, 504 U.S. at 619). Plaintiffs have alleged Defendants breached

nine contracts concerning drilling in the eastern region of Venezuela, and one contract concerning drilling in western region, pursuant to which the PDVSA Defendants agreed to pay a portion of the contracts in U.S. Dollars. (*See* Dkt. No. 1 ¶ 118). Each of the ten contracts contained a provision related to whether and under what conditions payments made in U.S. Dollars would be sent to the Bank of Oklahoma in Tulsa, Oklahoma. (*See id.* ¶ 43).

A foreign state promising to perform specific obligations in the United States, and then breaking that promise, has a "direct effect" in the United States under FSIA, without regard to how important the place of that performance was to the parties or the agreement. *See de Csepel*, 714 F.3d at 600-01; *see also I.T. Consultants, Inc. v. Islamic Republic of Pakistan*, 351 F.3d 1184, 1186 (D.C. Cir. 2003) ("[A] foreign sovereign's failure to make a contractually required deposit in a bank in the United States meets the statute's definition of a 'direct effect,' without regard to whether the parties considered the place of payment 'important,' 'critical,' or 'integral.'").

2. The contracts at issue in this litigation

Section 18.15 of the eastern drilling contracts provides:

> "PDVSA" agrees to pay in United States Dollars, the portion of the price of this CONTRACT set forth in such currency, under the following conditions:
>
> a) That the deposits made by PDVSA in the accounts previously identified or in any other accounts indicated by the CONTRACTOR will release PDVSA from its obligation to pay the portion of the price set in United States Dollars to the extent of the deposits made.
>
> b) PDVSA will always have the right, at any time and at its sole discretion, to pay the portion of the price set in United States Dollars, in that currency or in bolivars at the current rate of exchange in Caracas on the date of payment. In the event that the payment is made in Bolivars and the CONTRACTOR believes it has suffered losses as a consequence of the variation in the rate of exchange applied on the date of issue of the invoice and at the rate in force on the payment date thereof, the CONTRACTOR will submit the relevant claim according to the provisions of Clause 18.12 of this CONTRACT.

(Dkt. No. 40-1, at 22 (§ 18.15)).

The eastern drilling contracts were later supplemented by an Agreement on June 2, 2008 (the

June 2, 2008 Agreement) whereby PDVSA agreed to "pay 61% of the invoices for services rendered in the eastern region in U.S. dollars to a foreign bank account designated by H&P-Venezuela and the remaining 39% of the invoices for such services in bolivars." (Dkt. No. 22-1, at 14; *see also* Dkt. No. 40-7, at 2 (7111-2)). The PDVSA Defendants stress paragraph five of the June 2, 2008 Agreement, claiming they had no obligation to make payments in the United States because they retained an option not to do so:

> Without prejudice to all that is indicated above, the present agreement of partial payment in foreign currency shall be without effect when PDVSA deems it discretionally convenient, in accordance with its interests and considering changes in its Policies and Internal Rules.

(Dkt. No. 40-7, at 2 (¶ 5)).

Once PDVSA received an invoice from H&P-V, PDVSA had 30 days to dispute a line item before payment was due. (Dkt. No. 40-1, at 21 (§ 18.4); *see also* Dkt. No. 1, ¶ 45). The eastern region contract also reads that "in the event that PDVSA, for any reason, has not made the payments within this thirty (30) day term, the parties agree that this does not entitle them to legal actions against the other party." (Dkt. No. 40-1, at 21 (§ 18.4)). Nonetheless, until 2010, Defendants approved many invoices

requiring payment in U.S. Dollars to the Tulsa, Oklahoma bank account, pursuant to the June 2, 2008 Agreement. (*See* Dkt. No. 1, ¶ 44). In all, there were approximately 55 payments totaling $65 million to the Oklahoma bank account during the time period relevant to this litigation. (*See id.*).

Under the western drilling contract, payment was to be made in bolivars unless the foreign exchange control measures in Venezuela prevented H&P-V from exchanging local currency for U.S. Dollars, as necessary to meet U.S. Dollar obligations outside of Venezuela:

> If as a result of the exchange control measures established by the competent authorities, [H&P-V] is unable to obtain in a timely fashion the foreign currency required to perform its obligations abroad related to the performance of this CONTRACT, [Petróleo] agrees to pay in United States dollars the portion of the price of this CONTRACT set in said currency in accordance with current regulation, "Norms and Procedures for the Payment of Foreign Exchange for Construction, Goods and Services in the Western Division," for those items directly associated with the external component pursuant to the results of the corresponding audit. [H&P-V] shall indicate, for purposes of payment, the bank and

> account number where payments are to be made.

(Dkt. No. 40-3, at 21 (§ 18.14)).

In addition to the provisions regarding payment, particularly relevant to the direct effects analysis are the contractual provisions requiring the procurement by H&P-V of products from American companies. For example, H&P-V had to buy transformers from a company in Fremont, Ohio (*see* Dkt. No. 40-1, at 37; Dkt. No. 39, at 64); equipment used with blowout preventers to space equipment apart from a company in Stephenville, Texas (*see* Dkt. No. 40-1, at 38; Dkt. No. 39, at 64); a top drive from a company in Erie, Pennsylvania (*see* Dkt. No. 40-6, at 36; Dkt. No. 39, at 64); a blow out preventer from a company in Houston, Texas (*see* Dkt. No. 40-6, at 42; Dkt. No. 39, at 64); hardbanding from a different company in Houston, Texas (*see* Dkt. No. 40-4, at 38; Dkt. No. 39, at 64); flanged fittings from a company in Willison, Florida (*see* Dkt. No. 40-4, at 41; Dkt. No. 39, at 64); a forklift from a company in Peoria, Illinois (*see* Dkt. No. 40-6, at 44; Dkt. No. 39, at 64); and various products from a third company in Houston, Texas (*see*, *e.g.*, Dkt. No. 40-3, at 35; Dkt. No. 39, at 64). (*See also* Dkt. No. 1, ¶ 124 ("H&P-V routinely entered into third-party agreements with vendors, suppliers, and services companies in the United States, for the purpose of delivering goods and services from the United States to Venezuela to

permit H&P-V to perform its contracts with the PDVSA Defendants.").

3. Direct effect regarding payments to United States

The Supreme Court has addressed the meaning of "direct effect" in the context of the FSIA's commercial activities exception only once. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). In *Weltover*, the government of Argentina issued a Presidential Decree to extend the time it had to pay certain bonds. Certain entities "refused to accept the rescheduling and insisted on full payment, specifying New York as the place where payment should be made." *Id.* at 610. As to the "direct effect" component of 28 U.S.C. § 1605(a)(2), the Court rejected the suggestion that there is a "substantiality" or "foreseeability" requirement, and stated that "an effect is direct if it follows as an immediate consequence of the defendant's activity." 504 U.S. at 618 (citation, quotation marks, and ellipses omitted). It then found a direct effect with "little difficulty" because the entities challenging Argentina "had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 618-19.

Two years after *Weltover*, the D.C. Circuit decided *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994). In *Rafidain*, two Irish corporations sought to recover payments on letters of credit from banks that were part of the Iraqi government. Previously, the banks had made installment payments on the letters "mostly from accounts in United States banks." *Id.* at 1144. The *Rafidain* court distinguished *Weltover* because "[n]either New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have been paid Rafidain might well have paid them from funds in United States banks but it might just as well have done so from accounts located outside of the United States, as it had apparently done before." *Id.* at 1146-47 (footnote omitted). Even where there was no "'immediate consequence' in the United States from Rafidain's failure to honor the letters," the Court still found a "direct effect" in the United States under § 1605(a)(2). *Id.* Interesting to note about *Rafidain* is Judge Wald's concurrence, where she "emphasize[d] that, for an act to have a 'direct effect' in the United States, there is no prerequisite that the United States be contractually designated as the place of performance. . [E]ven absent a contractual provision mandating the involvement of U.S. banks, if the longstanding consistent customary practice between Rafidain and Goodman had been for Rafidain to pay Goodman from its New York

accounts, the breach of the letters of credit might well have had a direct and immediate consequence in the United States." *Id.* at 1147 (Wald, J., concurring).

As a result of *Weltover*, Judge Wald's concurrence in *Rafidain*, and other cases, Judges on the District Court for the District of Columbia have found that our Court of Appeals has "left open the possibility that a court could find a 'direct effect' based upon a non-express agreement to pay in the United States." *Idas Resources N.V. v. Empresa Nacional de Diamantes de Angola E.P.*, 2006 WL 3060017, at *9 (D.D.C. Oct. 26, 2006) (Huvelle, J.) (quoting *Global Index, Inc. v. Mkapa*, 290 F Supp. 2d 108, 114 (D.D.C. 2003) (Kennedy, J.)); *see also Agrocomplect, AD v. Republic of Iraq*, 524 F. Supp. 2d 16 (D.D.C. 2007) (Walton, J.) ("[T]his court need not consider whether it is necessary for parties to enter into an agreement designating a place for payment or vesting one party with complete discretion to name a place for payment contemporaneously with a contract giving rise to a breach of contract suit "); *cf. Cruise Connections*, 600 F.3d at 666 (stating "we have no need to consider whether a foreign sovereign had to have agreed to the use of a U.S. bank account," and distinguishing cases that addressed the issue in part because "none of those cases dealt with a situation like the one we face here: where the alleged breach resulted in the direct loss of millions of dollars worth of business in the

United States.") But whether or not Defendants' pattern and practice of making numerous payments totaling millions of dollars to a bank in the United States constitutes a direct effect that trumps Defendants' contractual discretion to pay Plaintiffs in Venezuela in Bolivars is not necessary for this Court to decide. There is a direct effect based on third-party impacts under the contracts based on D.C. Circuit precedent.

4. Direct effect regarding third party impacts

In *Cruise Connections Charter Management 1, LP v. Attorney General of Canada*, the D.C. Circuit indicated a broad view of the direct effect test. *See* 600 F.3d 661 (D.C. Cir. 2010). In *Cruise Connections*, the Royal Canadian Mounted Police (RCMP) cancelled a contract with the American company Cruise Connections to provide cruise ship services during the 2010 Olympics. The company had subcontracted with two U.S.-based cruise lines, Holland America and Royal Caribbean. The district court found that the defendant enjoyed sovereign immunity in part because "Cruise Connections' inability to perform its contractual obligations to the third party cruise lines constituted an intervening element between RCMP's breach and the broken third-party agreements." 600 F.3d at 664 (citation and quotation marks omitted). The D.C. Circuit reversed, finding not only that "the alleged breach

resulted in the direct loss of millions of dollars worth of business in the United States," but that the "direct effect" need not necessarily harm the plaintiff. *Id.* at 666. The FSIA "requires only that the effect be 'direct,' not that the foreign sovereign agree that the effect would occur." *Id.* at 665 (citation omitted).[8]

Plaintiffs here allege an impact of the breach that is sufficiently similar to the breach found to have a direct effect in *Cruise Connections.* In *Cruise Connections*, the contract itself required the ships to come from U.S.-based companies. Relying on this fact, the D.C. Circuit found that "RCMP's termination of the Cruise Connections contract led inexorably to the loss of revenues under the third-party agreements. This is sufficient." *Id.* The material before this Court indicates that Defendants agreed to contracts with Plaintiffs that required the purchase and use of specific parts from specific U.S.-based companies. The D.C. Circuit has previously indicated that such a finding is sufficient for a finding of direct effect. Accordingly, there is a direct effect here under the meaning of § 1605(a)(2).

---

[8] Cruise Connections also claimed that lost revenue expected from on-board purchases by security personnel staying on the ships constituted a direct effect, but the D.C. Circuit found it "need not decide whether non-payment of on-board revenues qualifies as a direct effect" because it found a direct effect through other factors.

This accords with the D.C. Circuit's recent interpretation of *Weltover*. In *Weltover*, the Supreme Court stated: "Money that was supposed to have been *delivered* to a New York bank for deposit was not forthcoming." 504 U.S. at 619 (emphasis added). In *Cruise Connections*, the D.C. Circuit extended this language, finding that "[b]ecause RCMP terminated the contract, revenues that would otherwise have been *generated* in the United States were 'not forthcoming.' 600 F.3d at 665 (emphasis added). The D.C. Circuit's interpretation of *Weltover*, binding on this Court, indicates that the third party contracts at issue here, the breach of which allegedly resulted in the loss of "revenues that would otherwise have been generated in the United States," have a direct effect as that term is used in the FSIA.

5. Plaintiffs' motion to enforce

Because the issue of whether this Court can exercise personal jurisdiction over the PDVSA Defendants consistent with constitutional due process is not clearly encompassed within the Initial Issues, the question will not be answered at this time. The Joint Stipulation was forged in part to postpone any obligations by Defendants to respond to Plaintiffs' discovery requests. Yet to resolve the question of constitutional due process in this case, discovery would likely be necessary. The parties came to an agreement to avoid discovery regarding

the Initial Issues, and therefore deciding this issue without permitting any discovery would conflict with precedent from the D.C. Circuit. *See El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) ("A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum.").

In addition, the PDVSA Defendants both indicated that the issues of statutory direct effect under the FSIA and constitutional due process, while related, are distinct, and also acknowledged that there are elements of the analysis of constitutional due process that are tied up with issues explicitly denoted as Additional Issues. As to the former point, the PDVSA Defendants indicated in their motion to dismiss that the statutory and constitutional issues are distinct. (*See* Dkt. No. 22-1, at 32). In their reply the PDVSA again indicated the issues are, though related, distinct. (*See* Dkt. No. 43, at 31 ("[N]ot only does H&P-Venezuela fail to satisfy the direct effect requirement of the FSIA, but the assertion of jurisdiction would *also* violate the due process protections to which the PDVSA Defendants are entitled." (emphasis added; citation omitted)). While the PDVSA Defendants argue that Plaintiffs have conceded the due process issue because the issue was raised in the PDVSA Defendants' motion

to dismiss and not responded to, (*see* Dkt. No. 43, at 31 n.24), this argument fails to persuade. Defendants made a number of arguments in their motions to dismiss that went unaddressed by Plaintiffs because of the Joint Stipulation. Constitutional due process is among them, and was not simply conceded.

As to the latter point, Defendants describe the constitutional argument as inextricably bound with issues that are clearly articulated as Additional Issues. (*See* Dkt. No. 43, at 10 and n.2 (stating that an assertion of jurisdiction would violate due process in part because the contracts "were negotiated and performed entirely in Venezuela [and] governed by Venezuelan law with a Venezuelan forum-selection clause," and arguing that this issue, clearly enumerated as an Additional Issue, should nonetheless "inform this Court's determination of whether it would be reasonable to assert jurisdiction commensurate with due process"); *id.* at 32 (referencing the alleged forum selection clauses again when arguing that "jurisdiction over the PDVSA Defendants would not comport with due process" (citation omitted))).

There are yet still other reasons why the constitutional due process argument should not be considered as part of the Initial Issues. For example, the D.C. Circuit has stated that "[t]he statutory requirements for personal jurisdiction do

not affect the constitutional in personam jurisdiction requirement that, pursuant to the due process clause of the Fifth Amendment, certain 'minimum contacts' must exist between the person and the jurisdiction." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 442 n.10 (D.C. Cir. 1990). Because the D.C. Circuit has previously separated the statutory and constitutional questions, because of the need for additional discovery, because of the way the issue was briefed by the PDVSA Defendants, and fundamentally because of the language of the Joint Stipulation, this Court finds that deciding the constitutional due process argument is not proper as part of the Initial Issues.

D. Standing of H&P-IDC

Standing jurisprudence springs from two sources: Article III's case-or-controversy requirement, and judicially self-imposed, prudential limitations. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). To establish constitutional standing, a plaintiff must demonstrate that it has suffered a concrete and particularized injury in fact, fairly traceable to the defendant's unlawful conduct, and show that the wrong is likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants do not challenge whether Article III's case-or-controversy requirements have been met, but only assert their

challenge under the shareholder standing rule. (*See* Dkt. No. 22-1 at 18-20); (Dkt. No. 43 at 10-12); (Dkt. No. 44 at 29-31); *cf.* (Dkt. No. 36, at 2-3) (clarifying that the Initial Issues are derived from Defendants' motions to dismiss).

Plaintiffs concede that H&P-IDC does not have standing regarding the breach of contract claims. (Dkt. No. 39, n.26) ("Plaintiffs do not contend that H&P-IDC has standing to bring the breach of contract claims."). The only issue regarding standing, then, is whether the company has standing regarding the expropriation claim.

Plaintiffs have alleged that H&P-IDC "suffered the expropriation of an entire company without compensation," (Dkt. No. 1, ¶ 85), and that "Venezuela's expropriation of the rigs deprived H&P-IDC of its ownership and control of H&P-V depriv[ing] H&P-IDC of its subsidiary and its business as a going concern, directly impacting the operations and bottom line of H&P-IDC," (*id.* ¶ 139). Plaintiffs have not only alleged that Venezuela took H&P-V's real and personal property, but that "[t]he seizure constituted a taking of the entirety of H&P's Venezuelan business operations . " (*Id.* ¶ 75). Plaintiffs aver that "Defendants took the entire business, which they now operate as a state-owned commercial enterprise," and as a result "H&P no longer . . maintains any commercial operations in Venezuela," (*Id.* ¶¶ 81, 85).

Defendants argue that, because H&P-IDC is not a party to any of the contracts at issue, they lack standing to bring a claim. As the PDVSA Defendants argue in their Reply, "H&P-IDC's standing argument has no merit. It has not, and cannot, cite a single case in which a court has permitted a shareholder to assert an injury to its corporation, as opposed to an injury to itself, when the corporation is able and willing to assert its own rights." (Dkt. No. 43, at 8).

Particularly relevant here is the prudential restriction regarding standing referred to as the shareholder standing rule. *See Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990). As the Supreme Court has said, this equitable rule "prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Id.; see also Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873, n.14 (D.C. Cir. 1984) ("No shareholder—not even a sole shareholder—has standing in the usual case to bring suit in his individual capacity on a claim that belongs to the corporation."). "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). And, indeed, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own

or have legal title to the assets of the subsidiary." *Id.* However, shareholders may still bring an action to enforce their own individual rights, "even where the corporation's rights are also implicated." *Franchise Tax Board*, 493 U.S. at 336. Therefore, standing for the plaintiff-shareholder depends on whether the shareholder's claim derives from the rights of the corporation or from a "direct, personal interest in [the] cause of action " *Id.*

According to the PDVSA Defendants, the shareholder standing "rule 'prohibits shareholders from initiating actions to enforce the rights of the corporation'" (Dkt. No. 22-1, at 18 (quoting *Franchise Tax Bd.*, 493 U.S. at 336)). But the word before that quote from *Franchise Tax Bd.* and omitted by the PDVSA Defendants is important: "generally." The sentence following the quote is instructive as well: "There is, however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Franchise Tax Bd.*, 493 U.S. at 336.

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003), also relied upon by Defendants, does not directly address this issu As is relevant here, in *Dole Food* the Supreme Court addressed a specific question, namely "whether a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a

majority of the shares of a corporate parent one or more tiers above the subsidiary." 538 U.S. at 471. The Court answered no to that question, and it also noted that "[t]he veil separating corporations and their shareholders may be pierced in some circumstances " 538 U.S. at 475. Thus, *Dole Food* is not directly on point, nor does it suggest that Plaintiffs' standing argument in this case is foreclosed.

In *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), the D.C. Circuit rejected an argument similar to the one offered here by Defendants regarding the standing of H&P-IDC. However, although the case supports Plaintiffs' argument about H&P-IDC's standing, it has a procedural history that Defendants suggest undercuts its precedential value. But considered together, the case and the developments that followed it suggest that Plaintiffs have the better argument.

In *Ramirez*, U.S. citizen Temistocles Ramirez de Arellano (Ramirez) was the sole shareholder of two U.S. corporations, which in turn wholly owned four subsidiaries incorporated in Honduras. Through this "chain of title," Ramirez owned "a large agricultural-industrial complex in the northern region of Honduras." 745 F.2d at 1506. The U.S. Department of Defense (DoD) seized "over half of the ranch's 14,000 acres and nearly 90% of the year-

round grazing land," and the DoD's operations helped to "destroy[] the plaintiffs' investment and Ramirez's life's work." 745 F.2d at 1508. Ramirez brought an action requesting declaratory and injunctive relief for the occupation and destruction of his property and for the deprivation of property without due process. The DoD raised a standing argument very similar to the one raised by Defendants in this case, and the D.C. Circuit rejected it. The *Ramirez* majority called the standing objection "a most extreme form of fanciful thinking. It is bizarre to posit that the claimed seizure and destruction of the United States plaintiffs' multi-million dollar investment, businesses, property, assets, and land is not an injury to a protected property interest." 745 F.2d at 1515. *See also id.* at 1518 ("The fact that the United States plaintiffs do not directly hold legal title to the real property does not deprive them of a property interest in the assets nor does it defeat their constitutional claims. Ramirez has a protected property interest in the allegedly occupied property both by virtue of his status as sole shareholder of the corporation and by virtue of his possession of the land for more than twenty years.").

It is true that after the 1984 *Ramirez* decision, the Supreme Court vacated it. *See* 471 U.S. 1113 (1985). The Supreme Court's one paragraph decision vacated and remanded for reconsideration in light of legislation enacted after the D.C. Circuit issued its

1984 opinion. On remand, the Circuit did not address the standing issue, but did dismiss the case without prejudice "so as not to bar reinstatement of the suit in the event the challenged activity resumes." *See* 788 F.2d 762, 764 (D.C. Cir. 1986). Although a decision vacated by the Supreme Court does not have precedential value when vacated because of disagreement with the ruling, *see Al Odah v. United States*, 321 F.3d 1134, 1143 (D.C. Cir. 2003), such is not the case here.[9] The Supreme Court did not address *Ramirez's* discussion of standing. However, while the case is helpful to Plaintiffs, its value is somewhat obscured by subsequent developments. Other cases, however, further the argument for H&P-IDC's standing.

The D.C. Circuit later recognized that a plaintiff could have standing for purposes of the FSIA expropriation exception under circumstances similar to those at issue here. *See Nemariam*, 491 F.3d 470. In *Nemariam*, the D.C. Circuit addressed the reasoning of the court in *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F Supp. 600 (W.D. Mich. 1985). In its discussion of that case, the D.C. Circuit

---

[9] The 1984 *Ramirez* decision continues to be cited approvingly by the D.C. Circuit, as well as other courts. *See, e.g., Transohio Say. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992); *Munns v. Clinton*, 822 F. Supp. 2d 1048 (E.D. Cal. 2011).

approvingly cited that court's holding that "the seizure of the controlling stockholder's interest in a corporation, triggered the [FSIA's] expropriation exception." *See Nemariam*, 491 F.3d at 478. The D.C. Circuit endorsed the *Kalamazoo* court's reasoning that "a controlling interest in the corporation's stock was no different from the corporation's physical assets under section 1605(a)(3) because '[i]n either case, the foreign state has expropriated control of the assets and profits of the corporation.'" *Nemariam*, 491 F.3d at 478 (quoting *Kalamazoo*, 616 F. Supp. at 663) (footnote omitted).

The Ninth Circuit has also come to the same conclusion regarding standing with respect to the FSIA expropriation exception. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). In *Siderman*, the plaintiffs brought an action claiming, among other things, that the Argentine military had unlawfully expropriated an Argentine corporation that was owned by four people, three with a 33% share each and a fourth with a 1% share. *See* 965 F.2d at 703. The corporation's "assets comprised numerous real estate holdings including a large hotel in [Argentina]." 965 F.2d at 703. One plaintiff in *Siderman* was a U.S. citizen who owned a 33% share, and the Ninth Circuit found that she had asserted a "substantial and non-frivolous" claim that her "property had been taken in violation of

international law," and thus she had standing "to invoke the international takings exception." 965 F.2d at 711-12. This parallels Plaintiffs' allegations in this case, whereby the Venezuelan military seized H&P-V by physically taking its assets.[10] The *Siderman* holding suggests H&P-IDC's standing argument is even stronger, as H&P-IDC is the full owner of H&P-V, as opposed to the 33% owner as in *Siderman*.

It is generally maintained that "[t]he shareholders' essential right is to share in the profits and in the distribution of assets on liquidation in proportion to their interest in the enterprise." 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 7:2 (3d ed. 2012). Thus, the complete physical seizure of a parent company's wholly-owned subsidiary, to the point of eliminating the corporation entirely (or comprehensively taking its assets and profits), deprives the parent shareholder of its "essential" and unique rights, giving rise to claims that would not belong to the corporation. Plaintiffs have alleged that Venezuela

---

[10] To the extent the PDVSA Defendants are trying to distinguish between the taking of corporate assets and the taking of a corporation, the parties have stipulated that the Court is to presume the truth of well-pleaded allegations in the complaint, and Plaintiffs have alleged more than the taking of a few corporate assets—they have alleged the taking of the entire corporation. (*See* Dkt. No. 1, ¶ 85).

completely expropriated all the physical property of H&P-V, such that H&P-IDC no longer has commercial operations in Venezuela. Construing Plaintiffs' allegations favorably, Defendants' actions have deprived H&P-IDC, individually, of its essential and unique rights as sole shareholder of H&P-V by dismantling its voting power, destroying its ownership, and frustrating its control over the company. Thus, H&P-IDC has "a direct, personal interest" in the complete taking of its wholly owned subsidiary, and has standing to bring its wrongful expropriation claim.[11]

---

[11] International custom has also recognized that shareholders have certain direct and individual rights in these kinds of expropriation claims:

> It is well known that there are rights which municipal law confers upon the [shareholder] distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties.

Barcelona Traction 1970 I.C.J. at 36. Plaintiffs have listed a number of additional sources for this practice in international law. (*See* Dkt. No. 39, at 43 n.25).

CONCLUSION

To summarize, the Court finds that H&P-V is a national of Venezuela under international law, H&P-IDC has standing to pursue the expropriation claim, Plaintiffs have sufficiently alleged a direct effect under 28 U.S.C. § 1605(a)(2), and the time is not yet ripe for a decision on whether the act of state doctrine bars Plaintiffs' expropriation claims. In addition, the issue of constitutional due process is not among the four Initial Issues, and therefore is not addressed as part of this Memorandum Opinion. Based on the foregoing analysis and the parties' Joint Stipulation, there will now be "a second phase of briefing on the motions to dismiss." (Dkt. No. 36, at 3).

Accordingly, Defendants' Motions to Dismiss (Dkt. Nos. 22, 23, and 24) are TEMPORARILY GRANTED IN PART and DENIED IN PART, and Plaintiffs Motion to Enforce (Dkt. No. 45) is GRANTED.

Date: September 20, 2013

/s/ Robert L. Wilkins
ROBERT L. WILKINS
United States District Judge

APPENDIX C—District Court's Order (Jan. 6, 2014)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No.
11-cv-01735 (RLW)

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND
HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A., AND
PDVSA PETRÓLEO, S.A.,

Defendants.

ORDER

The matter is before the Court on Plaintiff Helmerich & Payne de Venezuela, C.A. ("H&P-V")'s Motion for Entry of Partial Final Judgment on Its

Expropriation Claim Pursuant to Rule 54(b) Or, in the Alternative, for Authorization to Petition the Court of Appeals to Allow an Interlocutory Appeal under 28 U.S.C. § 1292(b).

It is undisputed that H&P-V's expropriation claim against Defendants is a "claim for relief" under Rule 54(b). It is further undisputed that the Court's September 20, 2013 dismissal of H&P-V's expropriation claim for lack of subject matter jurisdiction constitutes a final decision with respect to H&P-V's expropriation claim *See, e.g., Johnson v. Mukasey*, 248 F.R.D.347, 355 (D.D.C.2008).

In addition, the Court finds that there is no just reason to delay entry of partial final judgment in favor of Defendants on H&P-V's expropriation claim. The entry of partial final judgment will serve the interests of sound judicial administration because (1) immediate review of the dismissal of H&P-V's expropriation claim will not lead to multiple appeals addressing similar issues; (2) in light of Defendants' pending interlocutory appeals (Dkt. Nos. 59, 60), it is most efficient to resolve all appealable issues stemming from the Court's September 20 Order in one round of appellate review; and (3) in light of Defendants' pending interlocutory appeals, immediate review of H&P-V's expropriation claim will not impede the progress of the proceeding in this Court. The Court further finds that the equities militate in favor of entering partial final judgment,

which will likely avoid unnecessary delay and costs for the parties. *See Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8-10 (1980); *Bldg. Indus. Ass'n v. Babbitt*, 161 F.3d 740, 743-44 (D.C. Cir. 1998).

Accordingly, it is hereby ORDERED that Plaintiff H&P-V's motion is GRANTED pursuant to Rule 54(b).

It is further ORDERED that final judgment is hereby entered in favor of Defendants with respect to H&P-V's expropriation claim.

This is a final and appealable order.

IT IS SO ORDERED

Date: January 6, 2014

/s/ Robert L. Wilkins
ROBERT L. WILKINS
United States District Judge

APPENDIX D—Court of Appeals' Order Denying Panel Rehearing (July 30, 2015)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2014

Nos. 13-7169
1:11-cv-01735-RLW

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND
HELMERICH & PAYNE DE VENEZUELA, C.A.,

Appellees,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

Appellee,

PETRÓLEOS DE VENEZUELA, S.A. AND
PDVSA PETRÓLEO, S.A.,

Appellants.

Consolidated with 13-7170, 14-7008

BEFORE: GARLAND, Chief Judge; TATEL, Circuit Judge; and SENTELLE*, Senior Circuit Judge

---

ORDER

Upon consideration of the petition of appellees/cross-appellants for rehearing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/Ken Meadows*
Ken Meadows
Deputy Clerk

Filed On: July 30, 2015

---

* Senior Circuit Judge Sentelle would grant the petition.

APPENDIX E—Court of Appeals' Order Denying Rehearing En Banc (July 30, 2015)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2014

Nos. 13-7169
1:11-cv-01735-RLW

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND
HELMERICH & PAYNE DE VENEZUELA, C.A.,

Appellees,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

Appellee,

PETRÓLEOS DE VENEZUELA, S.A. AND
PDVSA PETRÓLEO, S.A.,

Appellants.

Consolidated with 13-7170, 14-7008

BEFORE: GARLAND, Chief Judge; HENDERSON, ROGERS, TATEL, BROWN, GRIFFITH, KAVANAUGH, SRINIVASAN, MILLETT, PILLARD, and WILKINS*, Circuit Judges

---

ORDER

Appellants/cross-appellees' petition for rehearing en banc and the response were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/Ken Meadows*
Ken Meadows
Deputy Clerk

Filed On: July 30, 2015

---

* Circuit Judge Wilkins did not participate in this matter.

APPENDIX F—Statutory Provisions Involved

The Foreign Sovereign Immunities Act provides, in relevant part:

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

* * * *

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the

foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a

United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

* * * *

28 U.S.C. § 1606. Extent of Liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

* * * *

SUPREME COURT, U.S.
FILED
JAN - 6 2016
OFFICE OF THE CLERK

No. 15-423

IN THE

Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
AND PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
AND HELMERICH & PAYNE DE VENEZUELA, C.A.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
ELISEBETH B. COLLINS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

QUESTIONS PRESENTED

The expropriation exception of the Foreign Sovereign Immunities Act of 1976 provides, in relevant part, that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). The questions presented are:

1. Whether the complaint in this case adequately pled a "tak[ing] in violation of international law," 28 U.S.C. § 1605(a)(3), by alleging that petitioners seized all of respondent Helmerich & Payne de Venezuela, C.A. ("H&P-V")'s oil rigs and productive assets without compensation based on discriminatory animus toward H&P-V's U.S. ownership.

2. Whether the complaint in this case adequately pled an injury to respondent Helmerich & Payne International Drilling Co. ("H&P-IDC")'s "rights in property," 28 U.S.C. § 1605(a)(3), by alleging that petitioners seized H&P-IDC's entire drilling business in Venezuela, including all the productive assets of H&P-IDC's wholly owned subsidiary.

3. Whether the court of appeals correctly applied this Court's decision in *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946), to hold that a court lacks subject-matter jurisdiction over a claim under the FSIA's expropriation exception only when the claim is "wholly insubstantial and frivolous."

CORPORATE DISCLOSURE STATEMENT

Helmerich & Payne International Drilling Company is a wholly owned subsidiary of Helmerich & Payne, Inc. Blackrock, a publicly traded company, owns approximately 10 percent of the stock of Helmerich & Payne, Inc.

Helmerich & Payne de Venezuela, C.A. is a wholly owned subsidiary of Helmerich & Payne International Drilling Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT 1

A. Respondents' Venezuelan Business 2

B. The Expropriation 3

C. Proceedings Below 7

REASONS FOR DENYING THE PETITION 11

I. THE DECISION BELOW CONFLICTS WITH NO DECISION OF THIS OR ANY OTHER COURT AND CORRECTLY APPLIED PRINCIPLES OF INTERNATIONAL LAW 11

A. The Court's Holding That H&P-V Adequately Pled A Discriminatory Taking In Violation Of International Law Does Not Merit Review 11

B. The Court's Holding That H&P-IDC Adequately Pled A Claim Implicating Its Own "Rights In Property" Does Not Warrant Review 18

C. The Court Of Appeals' Application Of *Bell* v. *Hood* Does Not Warrant Review 22

II. THE QUESTIONS PRESENTED DO NOT RAISE RECURRING ISSUES OF GREAT NATIONAL SIGNIFICANCE 27

TABLE OF CONTENTS—Continued

Page

III. EVEN IF THE PETITION PRESENTED ANY CERTWORTHY ISSUE, THIS CASE WOULD BE A POOR VEHICLE 29

CONCLUSION 31

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Abelesz v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012) 25

Agudas Chasidei Chabad of United States v. *Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) 22, 23, 24, 26

Anderson v. *Cox*, 503 F. App'x 495 (9th Cir. 2012) 20

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 22, 26

Banco Nacional de Cuba v. *Farr*, 383 F.2d 166 (2d Cir. 1967) 9, 13

Banco Nacional de Cuba v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962) 9, 12, 13

Bangor Punta Operations, Inc. v. *Bangor & Aroostook Railroad Co.*, 417 U.S. 703 (1974) 10

Barcelona Traction, Light & Power Co. (Belgium v. *Spain)*, 1970 I.C.J. 3 (Feb. 5) 15, 16, 21

Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544 (2007) 26

Bell v. *Hood*, 327 U.S. 678 (1946) 22, 23, 26

Broad v. *Sealaska Corp.*, 85 F.3d 422 (9th Cir. 1996) 20

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967) 30

TABLE OF AUTHORITIES—Continued

Page(s)

Byers v. *United States*, 4 F. App'x 763 (Fed. Cir. 2001) 20

Cargill International v. *M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993) 24

Cassirer v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) 23

Community Finance Group, Inc. v. *Republic of Kenya*, 663 F.3d 977 (8th Cir. 2011) 25

de Csepel v. *Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011) 30

Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 9, 18, 19

Duncan v. *Peninger*, 624 F.2d 486 (4th Cir. 1980) 20

First National City Bank v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 16

Fischer v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015) 14

Franchise Tax Board of California v. *Alcan Aluminium Ltd.*, 493 U.S. 331 (1990) 20

Freund v. *Société Nationale des Chemins de Fer Français*, 391 F. App'x 939 (2d Cir. 2010) 25

Hastings v. *Wilson*, 516 F.3d 1055 (8th Cir. 2008) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Mezerhane v. *Republica Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015) 15, 26

Moran v. *Kingdom of Saudi Arabia*, 27 F.3d 169 (5th Cir. 1994) 25

OBB Personenverkehr AG v. *Sachs*, 136 S. Ct. 390 (2015) 29

Orkin v. *Swiss Confederation*, 444 F App'x 469 (2d Cir. 2011) 25

Permanent Mission of India to the United Nations v. *City of New York*, 551 U.S. 193 (2007) 10, 14, 20

Ramirez de Arellano v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) 10, 21

Republic of Argentina v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) 17

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 29

Robinson v. *Government of Malaysia*, 269 F.3d 133 (2d Cir. 2001) 23, 24, 27, 28

Shapiro v. *McManus*, 136 S. Ct. 450 (2015) 26

Siderman de Blake v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) 14, 15, 23

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 16

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Acadiana Treatment Systems Inc.*, 2000 WL 634145 (5th Cir. May 3, 2000) 20

West v. *Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987) 23

Zappia Middle East Construction Co. v. *Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000) 25

STATUTES AND RULES

28 U.S.C.
§ 1331 26
§ 1603 18
§ 1604 27
§ 1605 ..... *passim*

Venezuela Commercial Code, art. 280(4) 19

S. Ct. R. 10 18

LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 ..... 5, 11, 16, 27

OTHER AUTHORITIES

Fletcher Cyclopedia of the Law of Corporations (2013 rev. ed.) 19

Fletcher Cyclopedia of the Law of Corporations (1971 ed.) 21

Restatement (Second) of Foreign Relations Law (1965) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Restatement (Third) of Foreign Relations Law (1987) 9, 12, 14, 15, 16, 17

Shapiro, Stephen M., et al., *Supreme Court Practice* (10th ed. 2013) 18, 30

U.S. Department of State, *2011 National Trade Estimate Report on Foreign Trade Barriers* (Mar. 11, 2010) 6

U.S. Trade Representative, *2011 National Trade Estimate Report on Foreign Trade Barriers* (Mar. 2011) 7

Wright, Charles Alan & Arthur R. Miller, *Federal Practice & Procedure* (3d ed. 2004) 26

IN THE

Supreme Court of the United States

No. 15-423

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
AND PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
AND HELMERICH & PAYNE DE VENEZUELA, C.A.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

Respondents Helmerich & Payne International Drilling Company ("H&P-IDC") and Helmerich & Payne de Venezuela, C.A. ("H&P-V") submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT

This case arises on petitioners' motions to dismiss. In the district court, the parties stipulated that for purposes of those motions, the facts as alleged in the complaint, CAJA 11-68, must be accepted as true. CA-JA 122-123; Pet. App. 48a. The following statement of facts relies on those undisputed allegations.

A. Respondents' Venezuelan Business

H&P-IDC is a Delaware corporation based in Tulsa, Oklahoma. Pet. App. 3a; CAJA 16. For decades, until 2010, H&P-IDC operated a successful oil and gas drilling business in Venezuela. Pet. App. 3a. H&P-IDC conducted that business through a local subsidiary incorporated in Venezuela, most recently H&P-V. Pet. App. 3a-4a.

To conduct its drilling services in Venezuela, H&P-IDC provided H&P-V with powerful land-based drilling rigs and other equipment. Pet. App. 4a; CAJA 19-20. From the United States, H&P-IDC made all significant operational decisions, such as whether and when to move rigs and assets from one region to another or into or out of Venezuela, and whether and when to enter into new contracts or extend existing ones. CAJA 47. H&P-IDC also provided significant managerial, technical, and administrative guidance and support to H&P-V CAJA 46-47. Although H&P-V is incorporated in Venezuela, the Venezuelan government has long designated and treated H&P-V as a "FOREIGN COMPANY at all relevant legal effects" under Venezuela's investment law due to H&P-V's 100% U.S. ownership. CAJA 39; *see also* CAJA 17.

Venezuela nationalized its oil industry in the mid-1970s, and thereafter H&P-V began providing drilling services directly—and, eventually, exclusively—to the state-owned petitioners Petróleos de Venezuela, S.A. and PDVSA Petróleo, S.A. (together, "PDVSA") and their affiliates. Pet. App. 4a. Both PDVSA companies are agencies or instrumentalities of petitioner Venezuela for purposes of the Foreign Sovereign Immunities Act ("FSIA"). Pet. App. 4a, 39a-40a; Pet. 6. H&P-V performed its drilling operations in Venezuela under a

series of contracts with PDVSA. Pet. App. 4a. The contracts typically had short terms ranging from five months to one year, with the understanding and expectation that upon completion they would be routinely extended. *Id.* In fact, they were routinely extended, effectuating a continuous work cycle. *Id.* The parties executed the most recent contracts in 2007.

Shortly after the 2007 contracts were executed, however, PDVSA began to fall substantially behind on payments. Despite complete performance by H&P-V, PDVSA failed to pay tens of millions of dollars due under the contracts. Pet. App. 4a-5a; CAJA 27-28. In negotiations, PDVSA repeatedly acknowledged its debt and promised to pay, but failed to do so. Pet. App. 4a; CAJA 27, 28-29. In 2009, H&P-V fulfilled its remaining obligations under the existing contracts and declined to enter into new ones, making clear that drilling could resume when PDVSA met its obligations. Pet. App. 4a-5a. By November 2009, H&P-V disassembled its drilling rigs and stacked the equipment in its yards pending payment by PDVSA. *Id.*

B. The Expropriation

PDVSA's refusal to honor its commitments under the parties' contractual relationship occurred against the backdrop of open and growing hostility by the Venezuelan government toward the United States and U.S.-owned companies. *See* CAJA 41-43. On September 11, 2008, the Venezuelan government had expelled the U.S. ambassador, CAJA 41; meanwhile, it deepened ties with U.S. adversaries like Iran, North Korea, and Syria, while its most senior officials directed virulent anti-U.S. rhetoric toward U.S. companies. *Id.* The U.S. Commerce Department reported that the Venezuelan

government was engaged in a campaign of "active discrimination" against American businesses. CAJA 42.

In June 2010, without apparent legal authority, petitioners seized respondents' Venezuelan drilling business. Pet. App. 5a; *see also* CAJA 29-35. Beginning on June 12, PDVSA employees, assisted by armed soldiers of the Venezuelan National Guard, blockaded the entrance of H&P-V's facility in Ciudad Ojeda, Venezuela and similarly seized H&P-V's other headquarters and property in Anaco, Venezuela. Pet. App. 5a; CAJA 29.

On June 29, 2010, the Venezuelan National Assembly issued a "Bill of Agreement" declaring the "public utility and social interest" of H&P-V's rigs and all associated "moveable and immoveable assets and other improvements of [H&P-V]." Pet. App. 6a; CAJA 31, 97-98. As the Bill proposed, then-Venezuelan President Hugo Chávez issued an Expropriation Decree that same day, authorizing the "forcible taking" of H&P-V's assets, including the rigs and "all the personal and real property and other improvements made by [H&P-V]." CAJA 31; *see also* Pet. App. 6a; CAJA 33-35. The Decree declared that "[t]he expropriated property will become the unencumbered and unlimited property of PDVSA, S.A., or its designee affiliate, as expropriating entity," and it directed PDVSA to "commence and carry out the expropriation procedure." CAJA 31. Two days later, PDVSA filed eminent domain proceedings in the Venezuelan courts. Pet. App. 8a; CAJA 32.

Despite H&P-V's participation in those proceedings, petitioners and the Venezuelan courts to this date—more than five years after petitioners seized respondents' entire Venezuelan business and initiated the Venezuelan proceedings—have failed to advance the proceedings beyond the preliminary stages. Pet. App.

8a; CAJA 32, 35. As alleged in the complaint, there is no prospect that the Venezuelan proceedings will result in any meaningful compensation, much less the "prompt[,] adequate[,] and effective compensation required by international law." H.R. Rep. No. 94-1487, at 19-20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618.

As the complaint explains in substantial detail—allegations that petitioners concede for present purposes to be true, *supra* p. 1—petitioners targeted and seized respondents' U.S.-owned business in Venezuela in substantial part because of the Chávez regime's pervasive anti-American animus. As set forth in the complaint, PDVSA and Venezuelan officials made clear in numerous public statements that H&P-V was being taken because of its U.S. ownership. *See* Pet. App. 5a-8a; CAJA 14, 30-31, 38-42. On June 23, 2010, before the Venezuelan legislature and President had formally authorized the expropriation, PDVSA trumpeted its seizure of respondents' U.S.-owned business: "[T]he Bolivarian Government, through [PDVSA] nationalized 11 drilling rigs" belonging to "the company Helmerich & Payne (HP), a U.S. transnational firm." CAJA 30; Pet. App. 5a. Two days later, PDVSA boasted about "[t]he nationalization of the oil production drilling rigs from the American contractor H&P," CAJA 30-31, and "emphatically reject[ed] statements made by spokesmen of the American empire—traced [sic] in our country by means of the oligarchy." CAJA 40; Pet. App. 5a-6a. They explained that the expropriation would "guarantee that the drills will be operated by PDVSA as a company of all Venezuelans"—no longer the property of an "American company" owned and managed by Americans. CAJA 41; Pet. App. 6a.

Petitioners further revealed their anti-American rationale for the expropriation as the seizure was being

finalized. When the Venezuelan National Assembly passed the Bill of Agreement, a Venezuelan official accused opponents of the expropriation of acting "in accordance with the instructions of the [U.S.] Department of State" and trying to "subsidize the big business transnational corporations, so that they can promote what they know best to do, which is war, ... through the large military industry, of the [U.S.] Empire and its allies." CAJA 40; Pet. App. 7a. Two days later, with the seizure complete, Venezuela's oil minister—who also served as president of PDVSA at the time—spoke at a political rally of PDVSA employees at H&P-V's Anaco yard, condemning respondents' "foreign gentlemen investors" and announcing that employees of "this American company" would become employees of PDVSA. CAJA 14; Pet. App. 7a-8a.

Consistent with that prediction, PDVSA now operates respondents' former business as a state-owned concern, using respondents' confiscated real and personal property and employing H&P-V's rig managers, rig workers, and other professionals to perform the functions the business used to perform when run by respondents. CAJA 33-35. Respondents no longer possess any significant tangible property or maintain any commercial operations in Venezuela. CAJA 35. Stripped of all its productive assets, H&P-V ceased to operate and no longer exists as a going concern. CAJA 34.

As noted, respondents have received not one penny of compensation. Although petitioners initiated eminent domain proceedings in the Venezuelan courts in July 2010, those proceedings remain in their early stages. Pet. App. 8a; CAJA 32, 35. Nor can any compensation be expected from Venezuela's politically controlled courts. *See* CAJA 15 (citing U.S. Dep't of State, *2009 Human Rights Report: Venezuela* (Venezuelan appel-

late court "ruled in favor of the government in 324 of the 325 cases brought by private citizens against the government")); U.S. Trade Rep., *2011 National Trade Estimate Report on Foreign Trade Barriers* 375 (Mar. 2011) ("[S]eventy-six companies, including several U.S.-owned firms, were nationalized pursuant to [a 2009 law] and none have received compensation to date."); CAJA 35-38, 52-55 (citing reports).

C. Proceedings Below

In September 2011, respondents filed suit against Venezuela and PDVSA in federal district court, asserting jurisdiction under the FSIA's expropriation exception. When certain conditions are met, that provision denies immunity to a foreign state and its agencies and instrumentalities in any case "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3).[1]

In August 2012, petitioners moved to dismiss on several grounds, some of which turned on factual questions requiring jurisdictional discovery, and some of which did not. Pet. App. 46a-49a. In a joint stipulation, the parties agreed to litigate four threshold issues based on the allegations in the complaint—before conducting any jurisdictional discovery—and to defer petitioners' other defenses for later adjudication following jurisdictional discovery. Pet. App. 8a-9a, 46a-49a; CAJA 121-124. Two of those initial issues are the subject

---

[1] H&P-V also alleged breach-of-contract claims against PDVSA, asserting jurisdiction under the FSIA's commercial-activity exception, 28 U.S.C. § 1605(a)(2). The court of appeals' holding that those claims cannot proceed under the FSIA, Pet. App. 23a-29a, is the subject of a separate pending petition for writ of certiorari. *See Helmerich & Payne Int'l Drilling Co.* v. *Bolivarian Republic of Venezuela*, No. 15-698 (Nov. 2015).

of this petition. First, petitioners invoked the so-called "domestic-takings rule" to contend that a taking by a sovereign state of the property of its own nationals is not a "violation of international law" as required under § 1605(a)(3), and that H&P-V—which is incorporated in Venezuela—therefore could not pursue a claim under the expropriation exception. Second, petitioners contended that H&P-IDC—which is incorporated in the United States—also could not sue in its own right because any injury was suffered solely by its subsidiary, H&P-V, which owned legal title to the seized property, and that H&P-IDC's own "rights in property" were therefore not "in issue" as required by § 1605(a)(3). Pet. App. 9a-10a.

The district court denied petitioners' motions to dismiss with respect to H&P-IDC's expropriation claim, Pet. App. 81a-91a, but granted it with respect to H&P-V's, Pet. App. 49a-59a, 91a. On appeal, the U.S. Court of Appeals for the D.C. Circuit affirmed in part and reversed in part. In an opinion by Judge Tatel, joined by Chief Judge Garland, the court held that H&P-IDC and H&P-V had each pled claims in which "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3).

As to H&P-V, the court held that it had adequately pled a discriminatory taking in violation of international law by alleging that petitioners had targeted H&P-V based on its U.S. ownership. Pet. App. 12a-16a. The court explained that international law recognizes an exception to the domestic-takings rule for discriminatory takings in which a state is alleged to have targeted a domestically incorporated but foreign-owned corporation for expropriation based on the corporation's alien ownership. The court found persuasive the reasoning of two Second Circuit decisions addressing the Castro

regime's analogous expropriation of U.S.-owned corporations incorporated in Cuba, Pet. App. 14a-15a, agreeing that "'[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders,'" courts may properly look beyond the "'nationality' of the corporate fiction" and look instead to the nationality of the controlling shareholders, Pet. App. 14a (quoting *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962)); *see also Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 185 (2d Cir. 1967) (reaffirming *Sabbatino* "with emphasis"). The court also found confirmation in the *Restatement (Third) of Foreign Relations Law*, which "recognizes discriminatory takings as a violation of international law" and cites the *Sabbatino* litigation as an example of a discriminatory taking prohibited under international law. Pet. App. 14a-15a (citing *Restatement (Third) of Foreign Relations Law* § 712 & reporter's note 5 (1987)). And the court noted the absence of any contrary authority from any other circuit.[2]

As to H&P-IDC, the court held that its "rights in property" are "in issue" even though H&P-IDC did not own legal title to the expropriated assets. Pet. App. 17a-22a. The court rejected petitioners' reliance on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), which addressed a provision of the FSIA that—unlike the expropriation exception—"expressly 'speaks of owner-

---

[2] The court also rejected petitioners' contention that the alleged facts did not show that the taking was discriminatory. Pet. App. 16a-17a. The court cited public statements made by petitioners and their officials that "went well beyond" any "economic and security need[]" for the expropriation and "could be viewed as demonstrating" the "'unreasonable distinction' based on nationality" required to establish a violation of international law under the *Restatement*. *Id.* (quoting *Restatement (Third)* § 712).

ship.'" Pet. App. 19a. Instead, the court followed this Court's analysis in *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007), which held that the phrase "rights in immovable property" in the FSIA's real-estate exception, 28 U.S.C. § 1605(a)(4), should not be "'limit[ed] ... to ownership or possession,'" but "'focuse[d] more broadly on "rights in" property.'" Pet. App. 19a (quoting *Permanent Mission*, 551 U.S. at 198). Applying *Permanent Mission*, the court of appeals recognized that shareholders like H&P-IDC may have rights in corporate property beyond their ownership of the subsidiary's shares. Pet. App. 19a-20a (citing *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 713 (1974), and *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1517 (D.C. Cir. 1984) (en banc), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985)). The court found the case for recognizing H&P-IDC's "rights in property" to be "especially persuasive" here because H&P-IDC was the sole shareholder of H&P-V and, "as a result of the expropriation, has suffered a total loss of control over its subsidiary, which has ceased operating as an ongoing enterprise." Pet. App. 22a.

Judge Sentelle dissented with respect to the expropriation issues. Pet. App. 30a-36a.

The court of appeals denied petitioners' requests for panel rehearing or rehearing en banc, Pet. App. 97a-98a, and denied petitioners' motion to stay the mandate, CA Order (Aug. 25, 2015) (per curiam). The Chief Justice denied petitioners' application to this Court for a stay of the mandate. No. 15A258 (Sept. 1, 2015).

Petitioners' other jurisdictional defenses remain pending before the district court, where jurisdictional discovery recently commenced.

REASONS FOR DENYING THE PETITION

This case is extraordinary in several respects in light of petitioners' conduct, but it does not warrant this Court's review. Rarely does a foreign sovereign expropriate—without any prospect of prompt, adequate, and effective compensation—the entire business and productive assets of a U.S.-owned company based on overt discriminatory animus toward the company's U.S. ownership. The issues arising out of these exceptional facts are unlikely to recur, and the court of appeals' resolution of them was consistent with the precedent of other circuits and this Court and with principles of international law. Moreover, even if any of petitioners' several questions presented were otherwise certworthy (and they are not), review would be inappropriate in the case's current posture. More than four years after respondents filed their complaint and more than five years after petitioners' uncompensated and discriminatory taking of respondents' Venezuelan business, respondents should at last be permitted to proceed with jurisdictional discovery into the factual bases of petitioners' assertion of sovereign immunity and—if they survive those defenses—be permitted to pursue on the merits the "prompt" compensation guaranteed them under international law.

I. THE DECISION BELOW CONFLICTS WITH NO DECISION OF THIS OR ANY OTHER COURT AND CORRECTLY APPLIED PRINCIPLES OF INTERNATIONAL LAW

A. The Court's Holding That H&P-V Adequately Pled A Discriminatory Taking In Violation Of International Law Does Not Merit Review

1. The phrase "'taken in violation of international law'" in § 1605(a)(3) includes "takings which are arbitrary or discriminatory in nature." H.R. Rep. No. 94-

1487, at 19-20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618; *see also Restatement (Third) of Foreign Relations Law* § 712 cmt. f (1987). The court of appeals concluded that H&P-V's allegations stated such a discriminatory taking because the expropriation was motivated in substantial part by petitioners' discriminatory animus toward the United States and the nationality of H&P-V's U.S. owners. Pet. App. 5a-8a, 13a-17a; CA-JA 14, 30-31, 38-42; *supra* pp. 3-4, 5-6.

That ruling does not conflict with any decision of this Court or any circuit. In the only cases to have addressed circumstances analogous to the extraordinary facts here, the Second Circuit twice held that a foreign state violates international law when it expropriates a domestically incorporated corporation based on discriminatory animus toward the foreign nationality of the corporation's shareholders. Pet. App. 13a-15a. In *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964), the Second Circuit acknowledged that "acts of a state directed against its own nationals" ordinarily do not "give rise to questions of international law." *Id.* at 861. But *Sabbatino* nonetheless held that the Castro regime's expropriation of the property of a U.S.-owned company incorporated in Cuba violated international law. The court noted that, regardless of the expropriated subsidiary's place of incorporation, over 90% of its shareholders were U.S. nationals, and the expropriation decree "clearly indicated that the property was seized because [the company] was owned and controlled by Americans." *Id.* In such circumstances, "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent ... to look only to the 'nationality' of the corporate fiction." *Id.* Rather, the court found "[t]he more

frequent practice in international litigation and negotiation seems to be that the nationality of the corporation is disregarded when it is different from the nationality of most of the corporation's shareholders." *Id.*

Although this Court reversed *Sabbatino* on other grounds, the Second Circuit on remand reaffirmed "with emphasis" that "the nationality of the corporate fiction" was not dispositive when a foreign state "treats a corporation in a particular way because of the nationality of its shareholders." *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 185 (2d Cir. 1967) (internal quotation marks omitted).

Three years after *Sabbatino*, the drafters of the *Restatement (Second) of Foreign Relations Law* adopted its precise holding as a paradigmatic illustration of a taking that entitles a domestically incorporated (but foreign-owned) entity to the protections of international law:

> Nationals of state A own all of the stock of X, a corporation of state B, doing business in B. B issues a decree nationalizing without compensation, the assets of all aliens and of all domestic corporations owned by aliens. X is an alien under the rule [for attribution of state responsibility] and the taking of its property is consequently a violation of international law[.]

Restatement (Second) of Foreign Relations Law § 171 cmt. d, illus. 3 (1965). In such circumstances, the *Restatement (Second)* explained, it would be "manifestly inequitable to permit the [expropriating] state to avoid responsibility on the ground that [the expropriated company] is also a national of that state." *Id.* § 171 cmt. d. When Congress enacted the FSIA's expropriation exception in 1976, it did so against this background

understanding of international law. *See Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 200 (2007) (interpreting FSIA's real-property exception and noting that the *Restatement (Second)* was "[t]he most recent restatement of foreign relations law at the time of the FSIA's enactment"). Subsequently, the *Restatement (Third)* again cited the facts of *Sabbatino* and *Farr* with approval as an example of a discriminatory taking. *Restatement (Third) of Foreign Relations Law* § 712 reporters' note 5; *see* Pet. App. 15a.

The decision below followed the reasoning of *Sabbatino*, *Farr*, and both *Restatements*, and no other circuit has deviated from that analysis. Petitioners claim to have identified a shallow circuit split, but the two allegedly conflicting decisions they cite (at 12-14)—*Fischer* v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015), and *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992)—did not address the question presented here. In *Fischer*, the Seventh Circuit reaffirmed that Hungarian Jews persecuted in the Holocaust—individual Hungarian citizens with no ties to any other nation—could state expropriation claims under international law because of the expropriation's "strong links to genocide." 777 F.3d at 858. Petitioners seize on dicta in *Fischer* observing that—absent genocide—"discrimination among a state's own nationals based on race, religion, ethnicity, or similar grounds" does not implicate international law. *Id.* at 857-858 (quoted at Pet. 13-14). But *Fischer* acknowledged at the same time that international law does prohibit "discrimination against aliens generally, or against aliens of a particular nationality or particular aliens." *Id.* at 857 (citing *Restatement (Third)* § 712 cmt. f). That statement is entirely consistent with *Sabbatino*, *Farr*, and the court of appeals' decision in this case, each of which simply recognizes

that "discrimination against aliens" is established when a domestically incorporated entity is targeted because of the sovereign's animus against that entity's foreign owners. As to that point, *Fischer*—which did not involve a corporate plaintiff, much less one wholly owned by foreign shareholders—is silent.

Similarly, in *Siderman*, the Ninth Circuit held in pertinent part that the FSIA's expropriation exception did not cover the claims of three individual Argentine citizens alleging that Argentina had seized their property due to a "discriminatory motivation *based on ethnicity*"—*i.e.*, the fact that they were Jewish. 965 F.2d at 712 (emphasis added). Like *Fischer*, *Siderman* did not decide the issue presented in this case: whether international law prohibits discriminatory takings targeting foreign-owned corporations based on the alienage of their owners.[3] But like *Fischer*, *Siderman* recognized—as petitioners concede (at 14)—that takings based on alienage "would violate international law." 965 F.2d at 712 (quoting *Restatement (Third)* § 712 cmt. f). There is no conflict for this Court to resolve.

2. Petitioners attack the decision below on its merits, citing *Barcelona Traction, Light & Power Co. (Belgium* v. *Spain)*, 1970 I.C.J. 3 (Feb. 5) (cited at Pet. 16). But their argument misses the mark entirely. *Barcelona Traction* did not involve a taking at all, much less one effectuated by the country of incorporation and motivated by animus toward the company's foreign ownership. In that case, the International Court of Justice

---

[3] *Mezerhane* v. *Republica Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015), *cert. filed* (U.S. No. 15-410), is inapposite for the same reason: It did not involve a discriminatory taking targeting a corporation's *alien* ownership, but rather a claim by a Venezuelan individual claiming that Venezuela had violated various human rights treaties.

(ICJ) examined the respective rights of countries to assert "diplomatic protection" and held only that the country of incorporation (Canada), rather than the shareholder's country (Belgium), was the proper country to assert a corporation's interests against a third country (Spain). And the ICJ stressed that, in other circumstances, "considerations of equity might call for ... protection of the shareholders in question by their own national State"—most notably where, as here, "the State whose responsibility is invoked [*i.e.*, Venezuela] is the national State of the company [*i.e.*, H&P-V]" that has suffered an injury in violation of international law. *Id.* at 48 ¶¶ 92-93. The *Restatement (Third)* accordingly explains that *Barcelona Traction* "does not preclude [diplomatic] representation of [a] company" in an action against the state of incorporation by another "state with significant links," including "the state of its parent corporation or of the parent's shareholders." *Restatement (Third)* § 213 reporters' note 3 (1987).[4]

Petitioners' reliance on *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), is also misplaced. *Sosa* admonished that courts generally "have no congressional mandate to seek out and define new and debatable violations of the law of nations" by creating new causes of action under the Alien Tort Statute. *Id.* at 728. But the FSIA's expropriation exception applies to takings that "violat[e] international law," 28 U.S.C. § 1605(a)(3), including "takings which are ... discriminatory in nature," H.R. Rep. No. 94-1487, at 19-20, *reprinted in* 1976 U.S.C.C.AN. at 6618; *see also Restatement (Third)*

---

[4] Petitioners cite (at 16 n.4) *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), but that decision cited *Barcelona Traction* only for the proposition that separate corporate personality is not dispositive of liability under international law in all circumstances. *Id.* at 628 n.20.

§ 712 cmt. f. The FSIA therefore requires courts to determine which takings are "in violation of international law," 28 U.S.C. § 1605(a)(3), including by consulting the background precedent and authority (such as *Sabbatino* and the *Restatement*) against which Congress enacted the expropriation exception. *Sosa* does not diminish that obligation.

3. Petitioners finally attempt to distinguish *Sabbatino* on its facts because the "official decrees authorizing the expropriation" in this case were not discriminatory "[on] the[ir] face." Pet. 17. The court of appeals rejected that factbound purported distinction, however, *supra* p. 9 n.2, and petitioners do not suggest that this aspect of the ruling conflicts with this Court's precedent or implicates any circuit conflict. Nor does it. International law prohibits all "'unreasonable distinction[s]'" based on alienage "that invidiously single out property of persons of a particular nationality." Pet. App. 14a (citing *Restatement (Third)* § 712 cmt. f) (emphasis omitted). International law does not proscribe only those discriminatory takings that include invidious rhetoric within the four corners of the government's official decree, while turning a blind eye to equally discriminatory takings, like this one, where the expropriating government candidly admits—indeed, publicly announces—that it is acting for discriminatory reasons.[5] Petitioners' argument presents a factbound and

---

[5] Contrary to petitioners' suggestion, the court of appeals rejected petitioners' factual claim based on the extensive record of petitioners' public statements, Pet. App. 16a-17a; *see supra* pp. 5-6; CAJA 14, 30, 34, 40—not on "intrusive demands for discovery" into petitioners' private motivations, *cf.* Pet. 17; *see also Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2258 (2014) (rejecting reliance on "apprehensions" about the application of ordinary discovery rules to foreign states).

case-specific question that does not merit review. S. Ct. R. 10; Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at 352 (10th ed. 2013).

B. The Court's Holding That H&P-IDC Adequately Pled A Claim Implicating Its Own "Rights In Property" Does Not Warrant Review

The court of appeals held that, as the sole shareholder of a subsidiary whose business was taken completely, H&P-IDC placed its own "rights in property ... in issue" under the FSIA's expropriation exception. Pet. App. 17a-22a. Petitioners do not contend that the court of appeals' narrow holding creates a circuit conflict, arises frequently, or otherwise holds great federal significance. That alone warrants denial of the petition on this issue. Petitioners do argue that the decision below was incorrect, relying primarily on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003). But the decision below is fully consistent with *Dole Food* and other precedent.

Petitioners read *Dole Food* to hold that only direct corporate ownership of legal title can constitute a "right[] in property" under the expropriation exception. Pet. 19-21 & n.5. But, as the court of appeals explained, *Dole Food* interpreted a separate FSIA provision that defined which entities qualify as "agenc[ies] or instrumentalit[ies] of a foreign state," 28 U.S.C. § 1603(b)(2), and "'speaks of ownership'" in that different context, Pet. App. 19a (quoting *Dole Food*, 538 U.S. at 474)); *see* 28 U.S.C. § 1603(b)(2) ("agency or instrumentality" includes any entity if "a majority of [the entity's] shares or other ownership interest is owned by a foreign state or political subdivision thereof"). Given the provision's textual references to "corporate" personhood, "owne[rship]" of shares, and "other ownership interest[s]," this Court concluded in *Dole Food* that "owner-

ship" under § 1603(b)(2) was limited to "direct ownership" under principles of "corporate law." 538 U.S. at 474-475. The Court did not suggest that such a definition should extend to other provisions lacking those specific textual limitations.

Unlike the provision at issue in *Dole Food*, the expropriation exception "speaks only of 'rights in property' generally." Pet. App. 19a; *see* 28 U.S.C. § 1605(a)(3). It suggests no textual limitations whatsoever on those rights. And petitioners cite no such limitations derived from the structure or history of the FSIA.

Moreover, even if petitioners were correct that *Dole Food* requires application of corporate-law principles to define the contours of "rights in property" under section 1605(a)(3), corporate-law principles would support the court of appeals' decision. In both the United States and Venezuela, corporate law recognizes that a parent corporation has the exclusive right to decide upon transactions in a subsidiary's property that change the nature of the subsidiary's business. *See, e.g.*, *Fletcher Cyclopedia of the Law of Corporations* § 2949.21 (2013 rev ed.) ("Every state requires in some, if not all, instances where all, or substantially all, of the corporate assets are sold or transferred that there be shareholder consent."); *id.* § 2949.40 ("The pertinent inquiry ... is whether the corporation can meaningfully continue the corporate enterprise in light of the sale."); Vz. Commercial Code, art. 280(4) (App. 1a-2a) (similar). Corporate law thus gives H&P-IDC a distinct "stick" in the "bundle" of property rights over H&P-V's assets: the exclusive power to control H&P-V's business by vetoing any substantial disposition of H&P-V's productive assets. By expropriating H&P-V's productive assets, petitioners took that "stick" when, in their words, they took the "company," CAJA 14; *see also* CAJA 34.

For similar reasons, and contrary to petitioners' contention (at 21-22), the court of appeals' holding is consistent with this Court's decision in *Franchise Tax Board of California* v. *Alcan Aluminium Ltd.*, 493 U.S. 331 (1990). There, this Court stressed that "there is ... an exception to th[e shareholder-standing] rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Id.* at 336. In this case, the court of appeals—which carefully considered both *Franchise Tax Board* and the shareholder-standing rule, Pet. App. 17a-18a—merely found that H&P-IDC suffered precisely such a direct and personal injury: the "total loss of control over its subsidiary, which has ceased operating as an ongoing enterprise because *all* of its assets were taken." Pet. App. 22a.[6]

Petitioners finally attack the court of appeals' reliance on *Permanent Mission of India*, 551 U.S. 193, but that argument mischaracterizes the court's holding. The court of appeals did not hold that *Permanent Mission of India* "requir[ed] [it] to accept whatever right in proper-

---

[6] None of the appellate decisions petitioners cite (at 21-22)—most of which were nonprecedential even in their circuits—involved a majority shareholder's right to control its subsidiary's business by deciding upon the disposition of all or substantially all of its productive assets. *See Broad* v. *Sealaska Corp.*, 85 F.3d 422, 429-430 (9th Cir. 1996) (subset of shareholders sued over transfer of specific assets); *Anderson* v. *Cox*, 503 F. App'x 495 (9th Cir. 2012) (taking claim against SEC by shareholders of delisted public company); *Byers* v. *United States*, 4 F. App'x 763, 764 (Fed. Cir. 2001) (per curiam) (taking claim involving only discrete assets seized from plaintiff's corporation); *United States* v. *Acadiana Treatment Sys. Inc.*, 2000 WL 634145, at *4 (5th Cir. May 3, 2000) (taking claim involving only "some of the subsidiaries' assets"); *Duncan* v. *Peninger*, 624 F.2d 486, 490 (4th Cir. 1980) (involving only discrete financial assets).

ty a plaintiff claims" or to "deem[] the source of the asserted right irrelevant." Pet. 23. Rather, the court correctly interpreted *Permanent Mission of India* as rejecting artificial limitations on existing "'rights in property.'" Pet. App. 19a-20a. And, contrary to petitioners' suggestions, that was not the end of the court of appeals' analysis. The court next turned to authorities recognizing the existence of shareholders' rights in corporate property based on corporate-law principles. Pet. App. 20a (quoting *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc)); *Ramirez*, 745 F.2d at 1518 ("It is settled law that ownership of stock constitutes a specific interest in the corporation's property."); *see also id.* & n.67 (quoting *Fletcher Cyclopedia of the Law of Corporations* § 5100 (1971 ed.)); *supra* p. 19 (corporate-law provisions). That is precisely the framework this Court applied in *Permanent Mission of India*.[7]

---

[7] Petitioners chide the panel for failing to "account for international law" in resolving H&P-IDC's claim. Pet. 24. But the passage of *Barcelona Traction* on which petitioners rely merely described the general rule under municipal law, and the ICJ made clear that "[m]unicipal law"—not international law—"determines the legal situation ... of those persons who hold shares in [corporate entities]." 1970 I.C.J. at 34 ¶41. The municipal-law principle *Barcelona Traction* recited, moreover, is exactly the rule embraced by respondents and the court of appeals here: "Whenever one of his direct rights is infringed, the shareholder has an independent right of action." *Id.* at 36 ¶47; *compare* Pet. App. 17a-18a, 22a. But Belgium had disclaimed reliance on that theory in that case. 1970 I.C.J. at 37 ¶49. Petitioners also criticize (at 25) the court of appeals' citation of *Ramirez*, 745 F.2d 1500, as an "example" of circumstances in which shareholders may have rights in corporate property. Pet. App. 20a. As the opinion makes clear, however, the majority did not feel itself constrained by *Ramirez*, but simply found it "especially persuasive" in light of its factual similarity to this case and its consistency with other decisions. *Id.* 22a; *see also id.* 19a-22a.

C. The Court Of Appeals' Application Of *Bell* v. *Hood* Does Not Warrant Review

The court of appeals analyzed petitioners' motions to dismiss under the standard set out in *Bell* v. *Hood*, 327 U.S. 678 (1946): "In an FSIA case, [a court] will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property ... in issue' only if the claims are 'wholly insubstantial or frivolous.'" Pet. App. 11a (quoting *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008)); *see also Agudas*, 528 F.3d at 940 (where "jurisdiction depends on the plaintiff's asserting a particular type of claim," "there typically is jurisdiction unless the claim is 'immaterial and made solely for the purpose of obtaining jurisdiction or ... wholly insubstantial or frivolous,' *i.e.*, the general test for federal-question jurisdiction under [*Bell* v. *Hood*]." (citation and footnote omitted)).

Petitioners attack the court of appeals' reliance on that standard, arguing for a FSIA-specific exception to the *Bell* standard. But they embraced that standard without objection in their briefing before the panel. *See* Pet. CA Br. 20. The petition should be denied for that reason alone. And in any event, their arguments mischaracterize the relevant decisions and ignore the parties' joint stipulation.

1. There is no circuit conflict. No court has endorsed the exception to *Bell* that petitioners seek.

The D.C. Circuit has long held that there is no FSIA exception to the *Bell* standard. In *Agudas*, relying on *Bell*, 327 U.S. at 682-683, and *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006), the D.C. Circuit held in the context of a FSIA expropriation case that

the question whether a plaintiff has put in issue "rights in property" "taken in violation of international law," 28 U.S.C. § 1605(a)(3), is reviewed under *Bell*. Establishing jurisdiction under § 1605(a)(3), the court explained, "effectively requir[es] that the plaintiff assert a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff's rights in property (or those of its predecessor in title) in violation of international law." *Agudas*, 528 F.3d at 941. And where jurisdiction "depends on the plaintiff's asserting a particular type of claim," *Bell* applies. *Id.* at 940.

As petitioners concede, the Ninth Circuit "applies the same test." Pet. 30-31 (citing *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010) (en banc)); *see also Siderman*, 965 F.2d at 712-713; *West* v. *Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987).

Contrary to petitioners' contentions, no circuit has held *Bell* inapplicable in circumstances like those here. Petitioners rely on the Second Circuit's decision in *Robinson* v. *Government of Malaysia*, 269 F.3d 133, 142 (2d Cir. 2001), in which the plaintiff invoked the FSIA's nondiscretionary-tort exception, 28 U.S.C. § 1605(a)(5). But *Robinson* did not depart from *Bell*. Rather, *Robinson* relied on *Bell* in stressing that "[a] district court does not ... decide a case on the merits in order to decide jurisdiction" and that "'[j]urisdiction is not defeated by the possibility that the averment might fail to state a cause of action.'" 269 F.3d at 142 (quoting *Bell*, 327 U.S. at 682).

Petitioners cite dicta in *Robinson* in which the panel majority indicated—over the disagreement of then-Judge Sotomayor—that where "'the jurisdiction and merits inquiries overlap,'" district courts may "'go be-

yond the bare allegations of the complaint,'" Pet. 27 (citing *Robinson*, 269 F.3d at 142), in order to "resolve disputed issues of fact" where "the defendant challenges the factual basis of the plaintiff's claim," *Robinson*, 269 F.3d at 141; *cf. id.* at 148 (Sotomayor, J., concurring in the judgment) ("find[ing] no basis for the majority's ... suggestion"). Whatever its merit, that dicta is not relevant here because petitioners expressly stipulated in the district court that their motions to dismiss do not challenge the truth of the factual allegations in the complaint. Pet. App. 48a. As a result of that stipulation and the purely legal nature of the petitioners' contentions, this case, like *Agudas*, did not require the D.C. Circuit to consider the point addressed by the *Robinson* dicta.[8]

Nor does *Robinson* support petitioners' effort to displace *Bell* in analyzing "the law as well as the facts." Pet. 27. The passage of *Robinson* petitioners cite simply observed that in deciding jurisdiction in FSIA cases, courts regularly encounter legal questions at the threshold that mirror questions that arise on the merits, such as whether an expropriation violates international law. *Robinson*, 269 F.3d at 143. *Robinson* did not hold—or have occasion to hold—that *Bell* would not

---

[8] In *Agudas*, the D.C. Circuit did "not express any opinion" on which standard applies "when jurisdiction depends on factual propositions intertwined with the merits of the claim." 528 F.3d at 940. Consistent with *Robinson*, though, the court acknowledged that where "jurisdiction depends on particular factual propositions" unrelated to the merits, the plaintiff must "present adequate supporting evidence"—citing with approval the same Second Circuit precedent on which *Robinson* relied. *See id.* (citing *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993)); *cf. Robinson*, 269 F.3d at 140-141 (citing *Cargill*, 991 F.2d at 1016, 1019).

apply in resolving such questions. Instead, it endorsed *Bell*'s application in FSIA cases. *Supra* p. 23.[9]

The other circuit decisions petitioners cite (at 28-29) also do not hold *Bell* inapplicable in FSIA cases. In *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 684-685 (7th Cir. 2012), the Seventh Circuit held that plaintiffs' allegations were insufficient to satisfy a purported exhaustion requirement and remanded to allow plaintiffs to expand on those allegations. *Abelesz* did not discuss *Bell* or decide the relevant standard, and there is no indication in the court's decision that the issue was even raised. Had the court addressed that issue expressly, it likely would have found plaintiffs' claims lacking under *Bell*. In *Community Finance Group, Inc.* v *Republic of Kenya*, 663 F.3d 977, 980 (8th Cir. 2011), the Eighth Circuit merely confirmed that, on a facial jurisdictional attack, district courts "'must accept all factual allegations in the pleadings as true and view them in the light most favorable to the nonmoving party.'" Petitioners stipulated to the same undisputed re-

---

[9] Like *Robinson, Moran* v. *Kingdom of Saudi Arabia*, 27 F.3d 169 (5th Cir. 1994), concerned only the propriety of "consider[ing] evidence presented beyond the pleadings," *id.* at 172—not the governing substantive standard. Petitioners' other Second Circuit citations—most of them nonprecedential—are even further afield, addressing facts that could not survive even under *Bell* and without mentioning the relevant standard. *Orkin* v. *Swiss Confederation*, 444 F. App'x 469, 470-471 (2d Cir. 2011) (plaintiff alleged a "taking" by a private individual); *Freund* v. *Société Nationale des Chemins de Fer Français*, 391 F. App'x 939, 940 (2d Cir. 2010) ("complaint itself allege[d] a sequence of events" that could not possibly satisfy the expropriation exception); *Zappia Middle E. Constr. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 250-253 (2d Cir. 2000) (plaintiff offered "no evidence" after two years of jurisdictional discovery on dispositive issue).

quirement here. Pet. App. 48a.[10] Finally, the Eleventh Circuit's decision in *Mezerhane*, 785 F.3d 545, like *Abelesz*, merely rejected a plaintiff's legal arguments without discussing or purporting to choose between *Bell* and any other standard. *Id.* at 548-551.[11]

2. The D.C. Circuit's refusal to carve out a novel FSIA exception to *Bell*—an exception petitioners never sought before the panel—was correct. To proceed under the expropriation exception, a complaint must put "in issue" rights in property taken in violation of international law. 28 U.S.C. § 1605(a)(3). As the D.C. Circuit has explained, this language "effectively requir[es] that the plaintiff assert a certain type of claim," *Agudas*, 528 F.3d at 941—precisely the type of question to which *Bell* applies, *see Bell*, 327 U.S. at 681-685; *Arbaugh*, 546 U.S. at 514; Wright & Miller, *Federal Practice & Procedure* § 1350 (3d ed. 2004).[12] This Court reiterated *Bell*'s vitality just last month, reaffirming that "only 'wholly insubstantial and frivolous' claims" implicate a failure to raise a substantial federal question for jurisdictional purposes. *Shapiro* v. *McManus*, 136 S. Ct. 450, 455 (2015).

Adherence to *Bell* is also more faithful to the FSIA's purpose. In codifying the restrictive theory of sovereign immunity, Congress maintained a distinction

---

[10] *Hastings* v. *Wilson*, 516 F.3d 1055 (8th Cir. 2008), did not involve the FSIA and did not discuss *Bell*.

[11] *Mezerhane* cited *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 572 (2007) (Stevens, J. dissenting), only for the proposition that "at the pleading stage, we take [plaintiff's] factual allegations to be the operative facts." 785 F.3d at 547.

[12] Federal-question jurisdiction turns on an "arising under" standard analogous to § 1605(a)(3)'s "in issue" standard. *See* 28 U.S.C. § 1331.

between immunity determinations and adjudications of liability. *Compare* 28 U.S.C. § 1604 ("Claims of foreign states to immunity should henceforth be decided by courts ... in conformity with the [FSIA]."), *with* H.R. Rep. No. 94-1487, at 12, *reprinted in* 1976 U.S.C.C.A.N. at 6610 ("The bill is not intended to affect the substantive law of liability."); *see also id.* at 20, *reprinted in* 1976 U.S.C.C.A.N. at 6618 (§ 1605(a)(3) "deals solely with issues of immunity" and "in no way affects existing [substantive] law"). Departing from *Bell* would eliminate this distinction "by removing the jurisdictional gateway to the statute and allowing a determination on the merits before jurisdiction is established." *Robinson*, 269 F.3d at 148 (Sotomayor, J., concurring in the judgment). Petitioners argue (at 31-32) that applying *Bell* undermines their perceived entitlement to be exempt from all burdens of litigation, but that argument is circular. The point of the dispute is whether petitioners are immune from suit in the first place. The only "burden" petitioners now face as a result of the court of appeals' decision is the burden of discovery into the factual bases of the jurisdictional defenses they have asserted.

II. THE QUESTIONS PRESENTED DO NOT RAISE RECURRING ISSUES OF GREAT NATIONAL SIGNIFICANCE

The issues presented in this case are unlikely to arise frequently. With respect to the H&P-V ruling, the court of appeals followed the rule applied by the Second Circuit in *Sabbatino* and *Farr*—two cases arising from the Castro regime's discriminatory expropriation of U.S.-owned businesses in 1960. In the more than 40 years between *Farr* and this case, no court of appeals has addressed the question. The reason is obvious: It is truly extraordinary for a state to enter into commercial contracts with a U.S.-owned company, target that com-

pany for expropriation based on its U.S. ownership, strip it of all its productive assets, refuse to pay even a penny in compensation, and then seek in the U.S. courts to hide behind corporate formalities. As to the H&P-IDC issue, no other court of appeals decision addresses the question. The reason again is unsurprising: States ordinarily do provide compensation for the taking of an entire business, obviating any separate claim for redress of the shareholder's separate injury. When they do not, relief is often available to both shareholders and subsidiaries before arbitral tribunals convened pursuant to bilateral investment treaties. It is only in the rare case where both avenues are foreclosed that shareholders might seek redress under the expropriation exception—and then only if they have full ownership over the subsidiary and all of the subsidiary's productive assets have been taken. There is thus no basis for petitioners' speculation that the decision below will encourage forum-shopping or have other implications for other cases.[13]

Petitioners suggest (at 33-34) that foreign sovereign immunity holds a privileged place on this Court's docket, and they assert a special need for uniformity in this area. To be sure, many questions arising under the FSIA do recur frequently, and the Court often ad-

---

[13] As for the *Bell* question, the issue is largely academic. As Justice Sotomayor noted in *Robinson*, "[l]itigants more commonly arrive at the result produced by [a merits-related] Fed. R. Civ. P. 12(b)(1) motion for lack of subject matter jurisdiction by moving early for dismissal under Fed. R. Civ. P 12(b)(6) for failure to state a claim upon which relief can be granted." 269 F.3d at 149 n.1 (Sotomayor, J., concurring in the judgment). The issue arose in this case only because petitioners insisted on adjudication of their purely legal jurisdictional arguments at the outset, instead of having them adjudicated concurrently with their factual defenses to jurisdiction—another feature of this case unlikely to be frequently replicated.

dresses those issues—not only because of their impact on foreign sovereign interests, but because they affect the ability of U.S. nationals to order their affairs around settled expectations as to when federal courts will be available. For example, *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015)—on which petitioners rely (at 33-34)—involved an issue under the FSIA's commercial-activity exception with potentially broad implications for the many other cases in which U.S. businesses and individuals engage in commerce with foreign states or their agents. The same has not been true with respect to the expropriation exception. Only one of the cases petitioners cite (at 33 n.10) implicated the expropriation exception at all—and even then, only tangentially. *See Republic of Austria* v. *Altmann*, 541 U.S. 677, 692 (2004) ("[The Court] confin[ed its] grant of certiorari to the issue of the FSIA's general applicability to conduct that occurred prior to the Act's 1976 enactment."). And as discussed, the facts of this case are *sui generis* even within the expropriation category.

Nor does petitioners' concern for uniformity succeed, since the decision below poses no threat to uniformity. And uniformity is of diminished importance in the context of uncompensated expropriations—inherently a one-time event for potential plaintiffs—compared to the commercial-activity context, where parties must make investment decisions and structure their affairs against the ever-present risk of litigation.

III. Even If The Petition Presented Any Certworthy Issue, This Case Would Be A Poor Vehicle

Review of the issues presented here would be premature in any event. Based on the parties' stipulation, the district court addressed only some of petitioners' jurisdictional defenses—*i.e.*, those that petitioners

insisted on briefing before submitting to any jurisdictional discovery. Pet. App. 47a-48a, 91a. Several other defenses—including purely legal issues bearing on sovereign immunity—remain pending in the district court. *See* Dist. Ct. Dkt. 77 (Oct. 19, 2015) (order governing jurisdictional discovery and adjudication of petitioners' remaining defenses). The court of appeals' decision was even narrower. Pet. App. 8a-9a, 22a-23a (declining to exercise pendant appellate jurisdiction over portions of district court's order). On remand, the parties have barely begun litigating petitioners' remaining threshold defenses. Dist. Ct. Dkt. 77 (Oct. 19, 2015). Litigation of the merits is still further on the horizon. Review at this stage of the proceedings would be inappropriate. *E.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); Shapiro et al., *Supreme Court Practice* § 4.18, at 282-283.

In addition, with respect to the H&P-V issue, the ruling below is supported by independent, alternative grounds that might very well render any decision by this Court irrelevant. In the district court and court of appeals, H&P-V argued in the alternative that petitioners were estopped from invoking the domestic-takings rule because the Venezuelan government has long treated H&P-V as a foreign national under Venezuelan law, denying it the advantages of Venezuelan citizenship due to its foreign ownership. *See* CAJA 39 (classifying H&P-V as a "FOREIGN COMPANY at all relevant legal effects" under Venezuela's investment law); Resp. CA Br. 36-38; Resp. CA Reply 16-21; *see also de Csepel* v. *Republic of Hungary*, 808 F. Supp. 2d 113, 129-130 (D.D.C. 2011), *aff'd on alternative grounds*, 714 F.3d 591, 598 (D.C. Cir. 2013) (expropriation claim may proceed when the country of citizenship "*de facto*

strip[s]" its subjects "of their citizenship rights"). The court of appeals did not reach this alternative ground, which would independently entitle H&P-V's expropriation claim to proceed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
ELISEBETH B. COLLINS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

JANUARY 2016

APPENDIX

VENEZUELA COMMERCIAL CODE, ART. 280

Código de Comercio

Articulo 280°

Cuando los estatutos no disponen otra cosa, es necesaria la presencia en la asamblea de un número de socios que represente las tres cuartas partes del capital social y el voto favorable de los que representen la mitad, por lo menos, de ese capital, para los objetos siguientes:

1° Disolución anticipada de la sociedad.

2° Prórroga de su duración.

3° Fusión con otra sociedad.

4° Venta del activo social.

5° Reintegro o aumento del capital social.

6° Reducción del capital social.

7° Cambio del objeto de la sociedad.

8° Reforma de los estatutos en las materias expresadas en los números anteriores.

En cualquier otro caso especialmente designado por la ley.

[English Translation]

Commercial Code

Article 280

When the bylaws do not provide otherwise, the presence in the meeting of a number of stockholders that represents three-fourths of the stated capital and the favorable vote of those who represent half, at least, of that capital is necessary for the following purposes:

(1) early dissolution of the company;

(2) extension of its duration;

(3) merger with another corporation;

(4) sale of firm assets;

(5) replenishment or increase of the stated capital;

(6) reduction of the stated capital;

(7) change of purpose of the corporation;

(8) amendments of the bylaws in the matters stated in the preceding numbers;

In any other case specially designated by law.

Supreme Court, U.S.
FILED
JAN 19 2016
OFFICE OF THE CLERK

No. 15-423

IN THE
Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

JOSEPH D. PIZZURRO
ROBERT B. GARCÍA
101 Park Avenue
New York, NY 10178

HOGAN LOVELLS US LLP

BRUCE D. OAKLEY
Counsel of Record
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

WILLIAM L. MONTS, III
MARY HELEN WIMBERLY
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 2

I. THE PETITION PRESENTS THREE QUESTIONS OF FEDERAL LAW ON WHICH COURTS ARE DIVIDED 2

A. The D.C. Circuit Split With Its Sister Circuits By Recognizing A Discrimination Exception To The Domestic-Takings Rule 2

B. The D.C. Circuit Impermissibly Recognized Shareholder Property Rights In Corporate Assets 5

C. There Is A Circuit Split Over The Standard Of Review For Expropriation-Exception Jurisdictional Pleadings 9

II. THE PETITION PRESENTS VITALLY IMPORTANT, RECURRING QUESTIONS, AND THIS CASE IS THE RIGHT VEHICLE TO RESOLVE THEM 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES:

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 10

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) 13

Banco Nacional de Cuba v. *Farr*, 383 F.2d 166 (2d Cir. 1967) 4

Banco Nacional de Cuba v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962) 4

Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belgium v. *Spain)*, 1970 I.C.J. 3 (Feb. 5, 1970) 4, 5, 7

Bell v. *Hood*, 327 U.S. 678 (1946) 9, 10

Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 5, 6

Filartiga v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) 10

Fischer v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015) 2, 3

Franchise Tax Bd. of Cal. v. *Alcan Aluminum Ltd.*, 493 U.S. 331 (1990) 5, 8, 9

In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998) 11

Labovitz v. *Washington Times Corp.*, 172 F.3d 897 (D.C. Cir. 1999) 6, 9

OBB Personenverkehr AG v. *Sachs*, 136 S. Ct. 390 (2015) 12-13

TABLE OF AUTHORITIES—Continued

Page(s)

Permanent Mission of India to the United Nations v. *City of New York*, 551 U.S. 193 (2007) 5, 7

Ramirez de Arellano v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) 8

Siderman de Blake v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) 3, 4

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 12

STATUTES:

28 U.S.C. § 1331 9-10

28 U.S.C. § 1350 10

28 U.S.C. § 1391(f)(4) 11

RULE:

Fed. R. Civ. P 8(a) 13

OTHER AUTHORITIES:

Restatement (Second) of Foreign Relations Law (1965) 4

Restatement (Third) of Foreign Relations Law (1987) 2, 4

Submission of United States, *GAMI Invs., Inc.* v. *United Mexican States*, UNCITRAL case (June 30, 2003), *available at* http://goo.gl/AlUR70 11

Submission of United States, *International Thunderbird Gaming Corp.* v. *United Mexican States*, UNCITRAL case (May 21, 2004), *available at* http://goo.gl/5sKZ6f 7

IN THE

Supreme Court of the United States

No. 15-423

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

Venezuela's petition presents important questions of federal law that divide the circuits, are contrary to Court precedent, violate international law, or all three. None are fact-bound; they arise from facial challenges to subject-matter jurisdiction; and all concern foreign-sovereign immunity under the FSIA. In addition, these pleadings-related questions are presented in the ideal posture: on motions to dismiss. Review should be granted.

ARGUMENT

I. THE PETITION PRESENTS THREE QUESTIONS OF FEDERAL LAW ON WHICH COURTS ARE DIVIDED.

A. The D.C. Circuit Split With Its Sister Circuits By Recognizing A Discrimination Exception To The Domestic-Takings Rule.

1. a. H&P does not dispute that the D.C. Circuit held that an FSIA plaintiff may properly plead a "discriminatory takings" "exception to the domestic[-]takings rule." Pet. App. 13a, 17a. And H&P does not dispute that the Seventh and Ninth Circuits have declined to recognize any such exception. Nonetheless, H&P argues that there is no conflict among the circuits because, like the D.C. Circuit, the Seventh and Ninth Circuits recognize that discriminatory takings *can* be unlawful. Br. in Opp. (BIO) 14-15. Of course they do; that is not the point. The point is that those courts, *un*like the D.C. Circuit, recognize that discriminatory takings violate international law only when a state has taken the property *of a national of another state*.

Here is the Seventh Circuit's language: "[t]he discrimination that concerns [*Restatement (Third) of Foreign Relations Law* § 712 (1987)] is discrimination against aliens, not discrimination among a state's own nationals based on race, religion, ethnicity, or similar grounds, however despicable such discrimination might be." *Fischer* v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847, 857 (7th Cir.), *cert. denied*, 135 S. Ct. 2817 (2015). And here is the Ninth Circuit's: "expropriation by a sovereign state of the

property of its own nationals does not implicate settled principles of international law," *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992) (brackets and quotation marks omitted), even where the expropriation is made with a "discriminatory motivation," *id.* at 712. These decisions cannot be reconciled with the D.C. Circuit's holding that there *is* a "discriminatory takings" "exception to the domestic[-]takings rule." Pet. App. 13a, 17a. *Cf.* Pet. App. 33a (Sentelle, J., dissenting) ("I would * * * conclude that Venezuela's reliance on the domestic takings rule is well taken").

b. H&P's other purported distinctions also fail. H&P claims that the Seventh Circuit's rejection of a discrimination exception to the domestic-takings rule in *Fischer* was "dicta." BIO 14. It was not. In *Fischer*, the Seventh Circuit affirmed dismissal because the plaintiffs failed to exhaust domestic remedies on their genocide-based expropriation claims. *See* 777 F.3d at 872. But to do so, it first had to reject the plaintiffs' argument that they did not need to exhaust domestic remedies because "a separate basis supported finding violations of international law: that the takings were 'discriminatory.'" *Id.* at 857 That holding was essential to the decision.

As for the Ninth Circuit, H&P offers the novel argument that *Siderman* is distinguishable because of the *basis* of discrimination at issue: ethnicity in *Siderman*, versus alienage here. Neither the Ninth Circuit nor the court below drew that distinction, however, because it does not exist. In fact, far from *distinguishing* discrimination based on "ethnicity" from discrimination based on "alienage," the Ninth Circuit treated the two as equivalent. When ruling that the *non-Argentinian* plaintiff's takings claim

could proceed, it quoted the Restatement's language on alienage-based discrimination to support its conclusion that the non-Argentinian plaintiff had properly pleaded an unlawful taking due to Argentina's "discriminatory motivation based on ethnicity." *Siderman*, 965 F.2d at 712.

2. H&P's remaining arguments go to the merits. Briefly, H&P misreads the Restatements. The *Restatement (Second)* recognizes the undisputed—and irrelevant—proposition that when a state nationalizes the *legal corporate entity*, shareholders' independent rights in their shares are destroyed, so the taking, if discriminatory, may violate international law with respect to foreign shareholders. *See Restatement (Second) of Foreign Relations Law* § 172 cmt. d, illus. 3 (1965) ("domestic corporations owned by aliens" nationalized). And the *Restatement (Third)* cites *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), and *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166 (2d Cir. 1967), only as examples of discriminatory *animus*. *See Restatement (Third)* § 712 reporter's n.5. The *Restatement (Third)* does not endorse a discrimination *exception* to the domestic-takings rule; to the contrary, Section 712 affirms that a discriminatory taking violates international law only if a state takes the property of the national of another state. Pet. 12.

In any event, none of these authorities detracts from the ICJ's authoritative position that domestic corporations "have no remedy in international law" against their state of incorporation, even in cases where foreign shareholders claim "discriminatory" treatment by the expropriating state. *Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belgium* v. *Spain)*, 1970 I.C.J. 3, 17 § I, 44

¶ 78 (Feb. 5, 1970). *Barcelona Traction* reflects international law at the time of the FSIA's enactment, and the court below erred in disregarding it.[1]

B. The D.C. Circuit Impermissibly Recognized Shareholder Property Rights In Corporate Assets.

The D.C. Circuit also held that the expropriation exception allows a shareholder to plead rights in an existing corporation's assets. This holding is contrary to established corporate-law principles, which apply to the FSIA as shown in *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003); it is contrary to international law, as set forth in *Barcelona Traction*; and it is not saved by *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007), or *Franchise Tax Bd. of Cal.* v *Alcan Aluminum Ltd.*, 493 U.S. 331 (1990).

1. a. The decision below conflicts with *Dole Food* because it disregards half of the opinion. The panel ignored (and contradicted) *Dole Food*'s application of the fundamental rule of statutory construction—that common-law principles apply unless a statute ex-

---

[1] H&P contends *Barcelona Traction* "did not involve a taking." BIO 15. Incorrect. Spain "seiz[ed] the assets" of a corporation owned by Belgian shareholders. *Barcelona Traction*, 1970 I.C.J. at 8-9 ¶ 13. Although *Barcelona Traction* arose in the context of diplomatic protection, the ICJ also discussed customary international law—what Venezuela cites in its petition and this reply. The same cannot be said for H&P's discussion of the hypothetical possibility of diplomatic protection by a shareholder's state. *See* BIO 16. That possibility is peculiar to diplomatic protection (as H&P's own description makes clear), and in any event, the ICJ declined to pass on the validity of that theory. *Barcelona Traction*, 1970 I.C.J. at 48 ¶ 92.

pressly abrogates them—to the FSIA. *See* 538 U.S. at 475-476. *Compare* Pet. App. 18a-19a; *with* Pet. App. 33a (Sentelle, J., dissenting) ("I differ with the majority's apparent belief that Venezuela's reliance upon *Dole Food* * * * is misplaced.").

H&P's response doubles down on the majority's error, arguing that corporate law is not part of the FSIA because it has not been expressly incorporated. Pet. App. 18a-19a; BIO 18-19. That is wrong, for the reasons that Venezuela has already offered. Pet. 19-21. Review should be granted to bring the D.C. Circuit in line with this Court's precedent.

b. H&P presses on by hedging on the merits and claiming that even if corporate law applies, the court below was correct, because corporate law recognizes shareholder rights in corporate property. H&P cites authorities supposedly in support of that proposition, but omits their context: all concern the *internal* affairs of a corporation, and shareholder rights with respect to management, or other shareholders. BIO 19, 21. None discusses shareholders' rights with respect to a third party's injury to corporate property. In that context, the law is clear: "when a third party injures a corporation," the shareholders' "claims are generally derivative rather than direct, and therefore they are not the real party in interest." *Labovitz* v. *Washington Times Corp.*, 172 F.3d 897, 902 (D.C. Cir. 1999) (quotation marks omitted).

2. In addition, as the petition made clear, the expropriation exception requires an FSIA plaintiff to plead that its property rights were taken in violation of international law; and under international law, H&P-IDC's property rights are not at stake. The

court below failed to account for, and acted contrary to, international law for H&P-IDC's claim. Pet. 24.

H&P offers no meaningful rebuttal. Its response is limited to a footnote that addresses only *Barcelona Traction*'s observation that municipal law determines the legal status of corporations and their shareholders. *See* BIO 21 n.7 It fails to mention that when, as here, municipal law recognizes the separate legal status of a corporation and its shareholders, that separation has consequences under *international* law: Shareholders do not have rights in corporate property while the corporation exists. *See Barcelona Traction*, 1970 I.C.J. at 35 ¶ 44, 38 ¶ 52, 41 ¶ 66; Submission of United States 1-3 ¶¶ 4-9, *International Thunderbird Gaming Corp.* v. *United Mexican States*, UNCITRAL case (May 21, 2004), *available at* http://goo.gl/5sKZ6f.

3. H&P instead retreats to *Permanent Mission*. Yet, as Venezuela's petition explained, the majority below departed from the Court's decision in that case by allowing H&P-IDC to claim property rights in its subsidiary's assets without identifying any direct source of those rights (such as ownership, possession, or contract). Pet. 22-24. H&P does not dispute Venezuela's description of *Permanent Mission*; rather, it quibbles with Venezuela's statement that the majority misread *Permanent Mission* to deem the source of property rights irrelevant. BIO 21. But here is the majority's language: "the FSIA's expropriation exception focuses *** *broadly* on rights in property, *Permanent Mission*, 551 U.S. at 198 (emphasis added), and its text imposes no limitation on the source of those rights." Pet. App. 22a (quotation marks omitted). If there is "no limitation" on the "source" of property rights under the FSIA, the source of those

rights is irrelevant. Venezuela's description is correct, and H&P's efforts to rewrite the majority's language make clear the majority's error.[2]

4. H&P also attempts to reconcile the decision below with this Court's precedent by citing *Franchise Tax Board*'s rule that "a shareholder with a direct, personal interest in a cause of action [may] bring suit even if the corporation's rights are also implicated." 493 U.S. at 336. According to H&P-IDC, it suffered a direct and personal injury in the form of the loss of control over H&P-V, due to the fact that all of H&P-V's assets were taken. BIO 20. That injury, however, is based entirely on its position as the parent corporation of H&P-V. (Indeed, H&P-IDC's damages claim for the loss of the expropriated oil rigs is *identical* to H&P-V's.) And that is precisely what *Franchise Tax Board* said was *not* a direct and personal injury. A shareholder must "have suffered direct injuries independent of their status as shareholders."

---

[2] The majority implied an (unidentified) source of shareholder rights in corporate property by citing its precedent under the Due Process Clause. *See* Pet. App. 19a-22a (discussing *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *cert. granted, judgment vacated*, 471 U.S. 1113 (1985)). That reasoning is flawed many times over. The Due Process Clause does not *create* property rights. The U.S. Constitution cannot create rights *against a foreign state*. The *Ramirez* judgment was vacated, yet the court of appeals gave *Ramirez* "precedential weight." Pet. App. 21a (quotation marks omitted). And *Ramirez* "effectively supplants * * * the general principle of corporate law that only management, or the shareholders by derivative actions with all the accompanying safeguards, may sue regarding injury to corporate assets." 745 F.2d at 1558 (Scalia, J., dissenting). Not to mention, the majority's resurrection of *Ramirez* reaches beyond the expropriation exception to claims against the United States. *See id.*

493 U.S. at 336-337 When the injury passes through the company to reach the shareholder, it is merely derivative. *See id.* at 337; *see also, e.g.*, *Labovitz*, 172 F.3d at 902-904.

More to the point, the majority below did not hold H&P-IDC had suffered a direct and personal injury. Rather, it established a rule in the D.C. Circuit that, under the expropriation exception, a shareholder properly pleads property rights in corporate assets taken by a foreign state. *Franchise Tax Board* thus does not make the second question presented any less worthy of this Court's review.

C. There Is A Circuit Split Over The Standard Of Review For Expropriation-Exception Jurisdictional Pleadings.

Finally, H&P cannot disguise the existence of a circuit split regarding the standard of review for jurisdictional pleadings under the expropriation exception. The D.C. and Ninth Circuits will grant a jurisdictional dismissal of an expropriation-exception claim based on legal inadequacy only if the claim is wholly frivolous. Pet. App. 11a-12a (applying the federal-question jurisdictional-pleading standard of *Bell* v. *Hood*, 327 U.S. 678 (1946)). The Second, Seventh, Eighth, and Eleventh Circuits apply a more demanding standard of review *See* Pet. 26-32.

1. H&P's response is that there is no conflict because the Second, Seventh, Eighth, and Eleventh Circuits have not expressly rejected *Bell*'s application to the FSIA (or because they cited *Bell* somewhere, no matter for what proposition). BIO 22-26. But these Circuits had no need to reject *Bell*. *Bell* established the pleading standard for "[a] claim invoking federal-question jurisdiction under 28 U.S.C.

§ 1331." *Arbaugh* v *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006). A claim invoking jurisdiction under the FSIA is not that, and this Court has never applied *Bell* to the FSIA.

More importantly, H&P does not seriously dispute that these Circuits *in fact* applied a standard more demanding than *Bell* to expropriation-exception jurisdictional pleadings. That establishes the circuit split.

2. H&P argues that, in any event, the court below was correct in its decision to extend *Bell* to the FSIA. This is not an argument directly bearing on the propriety of certiorari review Nevertheless, H&P is wrong, as jurisprudence in the analogous context of the Alien Tort Statute (ATS), 28 U.S.C. § 1350, demonstrates. When asked to address the question, courts have declined to apply *Bell* to ATS pleadings, reasoning that the ATS demands "a more searching preliminary review of the merits than is required, for example, under the more flexible 'arising under' formulation." *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). The same rule should apply to the FSIA, a similarly worded jurisdictional statute that also implicates important matters of foreign policy. *See* Pet. 32.[3]

---

[3] Venezuela did not "embrace" *Bell*. BIO 22. Rather, it cited binding Circuit precedent before the panel, and then challenged that precedent in its petition for rehearing en banc. In any event, the panel certainly passed on the appropriate pleading standard in its decision. Pet. App. 11a-12a.

II. THE PETITION PRESENTS VITALLY IMPORTANT, RECURRING QUESTIONS, AND THIS CASE IS THE RIGHT VEHICLE TO RESOLVE THEM.

1. The decision below has far-reaching implications for FSIA litigation. Under the generous pleading rules adopted by the court below, many more plaintiffs are likely to file in D.C. because their complaint will survive dismissal so long as it is not wholly frivolous. *See* 28 U.S.C. § 1391(f)(4) (any FSIA claim against foreign state or its political subdivision may be brought in D.C. federal court). As a matter of course, then, foreign states will now be subject to "the burdens of litigation," including "jurisdictional discovery," on the paltriest of allegations. *In re Papandreou*, 139 F.3d 247, 251, 254 (D.C. Cir. 1998) (quotation marks omitted), *superseded by statute on other grounds*. *See* Pet. 33-35.

H&P, which filed its own certiorari petition in this case on a different issue, does not dispute these implications. Instead, it claims—without authority—that the circumstances of this case are uncommon. *See* BIO 27-28. The U.S. Department of State has recognized otherwise: "Investors often choose to make an investment through a separate legal entity, such as a corporation, incorporated in the host State," and, as a result of that choice, it is "a *common situation*" that the corporation and its investors are "left without a remedy under customary international law." Submission of United States 3-4 ¶¶ 10-11, *GAMI Invs., Inc.* v. *United Mexican States*, UNCITRAL case (June 30, 2003) (emphasis added), *available at* http://goo.gl/AlUR70.

H&P also challenges the importance of uniformity in the law under the FSIA's expropriation exception and suggests that this Court's jurisprudence is primarily concerned with the expectations of "U.S. nationals." BIO 29. Wrong. The purpose of the FSIA is to ensure "a uniform body of law in this area" "in view of the potential sensitivity of actions against foreign states." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (brackets and quotation marks omitted).

2. This petition is the right vehicle to decide the questions presented. All three questions were passed on by the panel. The majority and dissenting opinions offer reasoned analyses for their disagreeing positions. And because the court refused to rehear the case en banc, that law is likely to remain uncorrected absent this Court's intervention.

H&P's alternative argument on the supposed correctness of the result reached on the discriminatory-takings claim does not change that fact. H&P-V likens itself to victims of the Holocaust stripped of *all* rights of citizenship and contends that because Venezuela treats H&P-V as foreign company in certain contexts, H&P-V in fact is not a national of Venezuela. BIO 30-31. No court has accepted H&P-V's argument. Moreover, it is irrelevant. The decision below establishes, as the law of the D.C. Circuit, a discriminatory-takings exception to the domestic-takings rule. Whatever alternative arguments that H&P-V might avail itself of on remand have no bearing on the cert-worthiness of this question.

3. Finally, the case is in the right posture to decide the presented pleadings-related questions. Like the similar cases of *OBB Personenverkehr AG* v. *Sachs*,

136 S. Ct. 390 (2015) (FSIA's commercial-activities exception), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009) (Rule 8(a) pleading requirements), this petition arises from a lower court's refusal to dismiss the complaint on immunity grounds.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

JOSEPH D. PIZZURRO
ROBERT B. GARCÍA
101 Park Avenue
New York, NY 10178

HOGAN LOVELLS US LLP

BRUCE D. OAKLEY
Counsel of Record
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

WILLIAM L. MONTS, III
MARY HELEN WIMBERLY
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Petitioners

January 2016

SUPREME COURT, U.S.
FILED
MAY 24 2016
OFFICE OF THE CLERK

No. 15-423

In the Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA, ET AL.,
PETITIONERS

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
SHARON SWINGLE
LEWIS S. YELIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

BRIAN J. EGAN
Legal Adviser
Department of State
Washington, D.C. 20520

QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that a foreign state and its instrumentalities are immune from suit in United States courts, subject to limited statutory exceptions. The expropriation exception provides that a foreign state is not immune from any suit "in which rights in property taken in violation of international law are in issue" and a specified commercial-activity nexus to the United States is present. 28 U.S.C. 1605(a)(3). The questions presented are:

1. Whether the complaint non-frivolously alleged that property was "taken in violation of international law," where petitioners seized the property of a corporation that is a national of the foreign state in order to discriminate against the corporation's United States parent;

2. Whether the complaint non-frivolously alleged that the United States parent corporation placed "rights in property" in issue within the meaning of Section 1605(a)(3); and

3. Whether a court lacks jurisdiction under Section 1605(a)(3) only when the plaintiff's claim that it has placed in issue "rights in property taken in violation of international law" is frivolous or completely devoid of merit.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 5
I. This Court should grant review to determine the proper standard for establishing jurisdiction under the FSIA's expropriation exception 7
A. The court of appeals' decision is wrong 7
B. The proper standard for establishing jurisdiction under the expropriation exception warrants this Court's review 13
II. The court of appeals' conclusion that respondents' expropriation claims are not frivolous does not warrant review 17
A. The first question presented, concerning whether H&P-V's allegations satisfy Section 1605(a)(3), does not warrant review 18
B. The second question presented, concerning whether H&P-IDC's allegations satisfy Section 1605(a)(3), does not warrant review 21
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Abelesz v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012) 14, 19
Agudas Chasidei Chabad of U.S. v. *Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008) 4, 11
Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 13
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 7
Banco Nacional de Cuba v. *Farr*, 383 F.2d 166 (2d Cir. 1967) 18

Cases—Continued: Page

Banco Nacional de Cuba v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), rev'd on other grounds by 376 U.S. 398 (1964) 4, 18, 19
Bell v. *Hood*, 327 U.S. 678 (1946) 4, 10, 11
Case Concerning the Barcelona Traction, Light & Power Co. (Belg. v. *Spain)*, 1970 I.C.J. 3 (Feb. 5) 19, 22, 23
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 20
de Sanchez v. *Banco Cent. de Nicar.*, 770 F.2d 1385 (5th Cir. 1985) 14, 18
Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 21
First Nat'l City Bank v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 15
Franchise Tax Bd. v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) 12
Mezerhane v. *República Bolivariana de Venez.*, 785 F.3d 545 (11th Cir. 2015), cert. denied, 136 S. Ct. 800 (2016) 14, 19
National City Bank v. *Republic of China*, 348 U.S. 356 (1955) 16
Owens v. *Republic of Sudan*, No. 01-2244, 2016 WL 1170[illegible] (D.D.C. Mar. 23, 2016) 17
Permanent Mission of India to the U.N. v. *City of N.Y.*, 551 U.S. 193 (2007) 8, 9, 22
Phoenix Consulting Inc. v. *Republic of Angl.*, 216 F.3d 36 (D.C. Cir. 2000) 8
Robinson v. *Government of Malay.*, 269 F.3d 133 (2d Cir. 2001) 14, 17
Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 7
Shapiro v. *McManus*, 136 S. Ct. 450 (2015) 21

Cases—Continued: Page

Siderman de Blake v. *Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993) 15, 19
Simon v. *Republic of Hung.*, 812 F.3d 127 (D.C. Cir. 2016) 12, 16, 19
United States v. *Belmont*, 301 U.S. 324 (1937) 19
Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 7, 9, 10, 13, 16
Zappia Middle E. Constr. Co. v. *Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000) 14

Statutes:

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.* 1
28 U.S.C. 1330(a) 7
28 U.S.C. 1604 1
28 U.S.C. 1605-1607 ..... 1, 7
28 U.S.C. 1605(a)(2) 3
28 U.S.C. 1605(a)(3) ..... *passim*
28 U.S.C. 1605(a)(4) 8, 22
28 U.S.C. 1605(a)(5) 17
28 U.S.C. 1605A(a)(1) 17
28 U.S.C. 1605A(c) 17
28 U.S.C. 41(1) (1940) 10
28 U.S.C. 1331 11
28 U.S.C. 1391(f)(4) 15

Miscellaneous:

H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 9, 15
Restatement (Third) of Foreign Relations of the United States (1987) 19

In the Supreme Court of the United States

No. 15-423

BOLIVARIAN REPUBLIC OF VENEZUELA, ET AL.,
PETITIONERS

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the third question presented.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, defines the scope of immunity from suit enjoyed by a foreign state. The FSIA provides that a foreign state and its agencies and instrumentalities are "immune from the jurisdiction" of federal and state courts except as provided by certain international agreements and by the exceptions to immunity in Sections 1605-1607. 28 U.S.C. 1604; see 28 U.S.C. 1605-1607. The "expropria-

tion exception," which is at issue in this case, provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which rights in property taken in violation of international law are in issue," and there is a specified commercial-activity nexus to the United States. 28 U.S.C. 1605(a)(3).

2. a. For many decades, respondent Helmerich & Payne International Drilling Company (H&P-IDC), a United States company, provided oil-drilling services to petitioners (the Bolivarian Republic of Venezuela and two state-owned corporations) through a wholly owned subsidiary, most recently respondent Helmerich & Payne de Venezuela, C.A. (H&P-V). H&P-V is incorporated under Venezuelan law. Pet. App. 3a-4a, 39a. By 2009, petitioners had failed to pay approximately $100 million owed to H&P-V for its drilling services. In response, H&P-V disassembled its drilling rigs after fulfilling its existing contractual obligations. *Id.* at 4a-5a.

In June 2010, petitioners blockaded H&P-V's properties. Pet. App. 5a. Shortly thereafter, the Venezuelan National Assembly enacted a bill recommending that then-President Hugo Chavez expropriate H&P-V's property. *Id.* at 6a. President Chavez issued an expropriation decree the same day. *Id.* at 6a, 44a. Petitioners "now use[] H&P-V's rigs and other assets in [their] state-owned drilling business." *Id.* at 8a.

b. Respondents filed this suit in the District Court for the District of Columbia. Pet. App. 45a-46a. Respondents alleged that petitioners had taken their property in violation of international law, and that the

district court had jurisdiction over that claim pursuant to Section 1605(a)(3).[1] *Id.* at 8a.

As relevant here, petitioners moved to dismiss on the ground that respondents' expropriation claims did not fall within Section 1605(a)(3). Pet. App. 8a. The parties agreed to brief certain threshold issues, including whether "H&P-V is a national of Venezuela under international law," and "whether H&P-IDC has standing to assert a taking in violation of international law" based on Venezuela's expropriation of H&P-V's property. *Id.* at 9a.

The district court granted the motion to dismiss in part and denied it in part. The court dismissed H&P-V's expropriation claim because it determined that H&P-V is a national of Venezuela. Pet. App. 49a-59a, 91a; see *id.* at 12a ("[G]enerally, a foreign sovereign's expropriation of its own national's property does not violate international law."). But the court declined to dismiss H&P-IDC's expropriation claim, reasoning that although H&P-IDC did not own the property petitioners allegedly seized from H&P-V, H&P-IDC asserted that petitioners effectively took its interest in H&P-V as a going concern. *Id.* at 81a-90a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-29a.

a. The court of appeals first addressed the standard for determining whether respondents' claims fell within the expropriation exception. Pet. App. 11a-12a.

---

[1] Respondents also alleged that petitioners had breached the drilling contracts, and that the court had jurisdiction over that claim under the FSIA's commercial-activity exception. Pet. App. 8a; see 28 U.S.C. 1605(a)(2). Respondents' contract claims are at issue in No. 15-698. At the Court's invitation, the United States is separately filing an amicus brief in that case.

The court first rejected petitioners' contention that respondents' claims did not fall within Section 1605(a)(3) because they did not describe a "tak[ing] in violation of international law." 28 U.S.C. 1605(a)(3); Pet. App. 11a. Relying on *Bell* v. *Hood*, 327 U.S. 678 (1946), and D.C. Circuit precedent, the court of appeals stated that subject-matter jurisdiction "is not defeated" by the possibility that a complaint "might fail to state a cause of action on which petitioners could actually recover." Pet. App. 11a; see *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 940-941 (D.C. Cir. 2008). The court stated that "we will grant a motion to dismiss" for lack of jurisdiction under the FSIA "on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property . . . in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" Pet. App. 11a (citing *Chabad*, 528 F.3d at 943).

The court of appeals next held that H&P-V's expropriation claim was not frivolous. Pet. App. 12a-17a. The court acknowledged that, under the so-called domestic-takings rule, a foreign state's expropriation of its own national's property does not violate international law. *Id.* at 12a. But the court understood a pre-FSIA Second Circuit decision to hold that international law prohibits a state from expropriating the property of a domestic corporation based on discrimination against the corporation's foreign shareholders. *Id.* at 13a-14a (discussing *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), rev'd on other grounds by 376 U.S. 398 (1964)). In light of *Sabbatino*, and in the absence of "any decision from any circuit that so completely forecloses H&P-V's discriminatory takings theory as to *inescapably* ren-

der the claim[] frivolous and *completely* devoid of merit," the court of appeals held that H&P-V's claim "has satisfied this Circuit's forgiving standard." *Id.* at 16a (citation and internal quotation marks omitted).

The court of appeals likewise held that H&P-IDC's claim that its own "rights in property" had been taken in violation of international law was not frivolous. Pet. App. 17a-22a. The court noted that "shareholders may have rights in corporate property" that are not derivative of the corporation's rights, *id.* at 20a, and that H&P-IDC alleged that it had suffered "a total loss of control over its subsidiary," *id.* at 22a.

b. Judge Sentelle dissented in part. Pet. App. 30a-36a. He disagreed with the court of appeals' expropriation holdings, and he would have held that both H&P-V and H&P-IDC had "failed to plead a taking in *violation of international law.*" *Id.* at 34a.

DISCUSSION

In the first two questions presented, petitioners challenge the court of appeals' determination that H&P-V's and H&P-IDC's expropriation claims may proceed under Section 1605(a)(3). In the third question presented, petitioners challenge the court's use of the frivolousness standard to determine whether respondents had established jurisdiction under Section 1605(a)(3). The Court should grant the petition for a writ of certiorari, limited to the third question presented.

We first address the third question presented because it concerns the appropriate standard for adjudicating the issues addressed in the other two questions presented—namely, whether respondents' allegations satisfy Section 1605(a)(3)'s jurisdictional requirements. The court of appeals erred in holding that Section

1605(a)(3), which permits claims "in which rights in property taken in violation of international law are in issue," is satisfied whenever a plaintiff makes merely a *non-frivolous* allegation that the case places in issue "rights in property taken in violation of international law." 28 U.S.C. 1605(a)(3). The court should have examined whether respondents' allegations *actually* describe a "tak[ing] in violation of international law" —that is, conduct that is prohibited by international law—and whether respondents' allegations *actually* identify their own "rights in property" that were impaired as a result of petitioners' conduct. The courts of appeals are divided on the appropriate pleading standard, and the question implicates important foreign-relations and uniformity concerns. This Court's review is warranted.

The Court should not grant plenary review with respect to the other two questions presented. The court of appeals held only that respondents' allegations that petitioners expropriated their property rights in violation of international law were not frivolous. Those limited conclusions, which followed from the court's use of the erroneous frivolousness standard, do not independently warrant review at this stage. That is so regardless of the Court's disposition of the pleading-standard question. If this Court reviews the pleading standard and concludes that the court of appeals should have considered whether respondents' allegations actually describe "rights in property taken in violation of international law," then the Court should permit the lower courts to undertake that inquiry in the first instance. Conversely, if the Court affirms, or declines to review, the court of appeals' use of the frivolousness standard, then there is no need for this

Court to review the court of appeals' case-specific application of that standard to respondents' allegations.

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE PROPER STANDARD FOR ESTABLISHING JURISDICTION UNDER THE FSIA'S EXPROPRIATION EXCEPTION

A. The Court Of Appeals' Decision Is Wrong

1. The FSIA provides that the district courts shall have jurisdiction over actions against a foreign state for "any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. 1330(a). Sections 1605-1607, in turn, set forth the specific standards governing whether a foreign nation is entitled to sovereign immunity. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488, 497 (1983). Thus, "subject matter jurisdiction" in any action against a foreign state "depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Id.* at 493; see *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993) (same); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (same).

For that reason, "[a]t the threshold of every action in a District Court against a foreign state, * * * the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." *Verlinden*, 461 U.S. at 493-494. When the foreign state moves to dismiss on the ground that the claim, as pleaded, does not satisfy the requirements of the relevant exception

to immunity, the court must determine whether the allegations are legally sufficient to satisfy those requirements.[2] In *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007) (*Permanent Mission*), for instance, this Court determined whether, as a matter of law, the plaintiff's claim to enforce a tax lien under New York law fell within Section 1605(a)(4), which creates an exception to immunity for suits "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). The Court first determined the scope of Section 1605(a)(4)'s reference to "rights in * * * property," concluding that it extended to non-ownership and non-possessory interests. *Permanent Mission*, 551 U.S. at 198-199. The Court then analyzed the content of the lien right asserted under New York law, concluding that the tax lien encumbered the right to convey the property at issue. *Ibid.* The Court accordingly held that the lien-enforcement suit "implicates 'rights in immovable property'" within the meaning of the FSIA exception. *Id.* at 199. The Court thus determined that the claim pleaded in the complaint was legally sufficient to fulfill Section 1605(a)(4)'s requirements.

2. Using language parallel to that of Section 1605(a)(4), at issue in *Permanent Mission*, the expropriation exception to foreign sovereign immunity permits a suit against a foreign state in any case "in

---

[2] When the foreign state challenges the factual basis for jurisdiction, by contrast, the court must go beyond the pleadings and resolve disputed issues of fact necessary to determine jurisdiction. *Phoenix Consulting Inc.* v. *Republic of Angl.*, 216 F.3d 36, 40 (D.C. Cir. 2000). This case involves a legal, not factual, challenge to jurisdiction under the expropriation exception.

which rights in property taken in violation of international law are in issue," and there is a specified commercial-activity nexus to the United States. 28 U.S.C. 1605(a)(3). Apart from the nexus requirement, which is not at issue in this case, Section 1605(a)(3) contains two primary substantive requirements. First, the case must be one in which "rights in property" are "in issue"—in other words, the complaint must identify the plaintiff's property rights that serve as the basis for its claims. See *Permanent Mission*, 551 U.S. at 198-199. Second, there must have been a "tak[ing] in violation of international law." For a court to "satisfy itself" that a claim comes within Section 1605(a)(3), *Verlinden*, 461 U.S. at 494, it must determine that the plaintiff's allegations fulfill those requirements, *Permanent Mission*, 551 U.S. at 198-199.

Accordingly, a court evaluating its jurisdiction under Section 1605(a)(3) must make a legal determination that the complaint places "in issue" property rights that were "taken in violation of international law." The court must verify that the complaint contains allegations that describe a taking prohibited by international law.[3] If the allegations are legally insufficient to describe such a violation—if, for instance, the alleged taking constitutes only a violation of municipal law—then the complaint has not placed "in

---

[3] The legislative history provides guidance on the scope of the inquiry, stating that "[t]he term 'taken in violation of international law' would include" certain well-established claims under international expropriation law, such as "the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law," and "takings which are arbitrary or discriminatory in nature." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19-20 (1976).

issue" rights in property "taken in violation of international law." Similarly, if the allegations are legally insufficient to establish that the plaintiff seeks to vindicate its own rights in property, the complaint has not placed "in issue" "rights in property." In either scenario, the allegations in the complaint do not satisfy Section 1605(a)(3)'s jurisdictional requirements.

3. The court of appeals did not undertake the required analysis. Instead of determining whether H&P-V's allegations actually state a violation of international law or H&P-IDC's allegations actually place its own "rights in property" in issue, the court examined only whether respondents' allegations on those points were "wholly insubstantial or frivolous." Pet. App. 11a (citation omitted); *id.* at 16a, 20a. The court thus failed to conduct the legal analysis necessary to determine whether the action falls within Section 1605(a)(3)'s exception to immunity.[4] *Verlinden*, 461 U.S. at 493-494.

In framing the question as whether respondents' expropriation claims were frivolous, the court of appeals relied on *Bell* v. *Hood*, 327 U.S. 678 (1946). There, this Court construed 28 U.S.C. 41(1) (1940), which conferred on federal courts jurisdiction over any action that "arises under" the Constitution, treaties, or laws of the United States. 28 U.S.C. 41(1)

---

[4] Respondents' claims on the merits are that their property was taken in violation of international law. Resps. C.A. Br. 16; see 11-cv-1735 Docket entry No. 1 (D.D.C. Sept. 23, 2011) (Compl. ¶¶ 172-181). It is unclear, however, what right of action respondents invoke. To the extent respondents' complaint may be understood to assume that Section 1605(a)(3) itself provides an implied right of action, the court of appeals did not address that issue, and it is not presented here.

(1940); see 28 U.S.C. 1331. As the Court explained, a claim "arises under" federal law if the claim will be "sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Bell*, 327 U.S. at 685; see *Merrill Lynch* v. *Manning*, No. 14-1132 (May 16, 2016), slip op. 8-10 (describing "arising under" jurisdiction). Thus, the federal-question statute has been understood to separate the jurisdictional inquiry from any examination of the legal sufficiency of the claim: a claim may "arise[] under" federal law even if the court's ultimate construction of federal law will defeat the plaintiff's claim. The Court applied that principle in *Bell*, holding that "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." 327 U.S. at 682. The Court also explained, however, that a suit asserting an "alleged claim under the Constitution or federal statutes" that "is wholly insubstantial and frivolous" may be "dismissed for want of jurisdiction." *Id.* at 682-683.

The D.C. Circuit has understood *Bell* to establish a general rule, equally applicable to the FSIA as to Section 1331, that "jurisdiction . . . is not defeated . . . by the possibility that" a complaint "might fail to state a cause of action." Pet. App. 11a (quoting *Bell*, 327 U.S. at 682); see *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008) (*Chabad*). The D.C. Circuit has accordingly held that whenever, as in this case, "the plaintiff's claim on the merits directly mirror[s] the jurisdictional standard" set forth in the FSIA, the court should find the jurisdictional standard satisfied so long as the plain-

tiff's claim is not frivolous. *Simon* v. *Republic of Hung.*, 812 F.3d 127, 140 (2016).[5]

That approach is founded on a misunderstanding of the scope of *Bell*. Rather than announcing a general rule that would apply to other jurisdictional grants without regard to their text, *Bell* rested on an interpretation of the specific language of the federal-question statute. Under that statute, jurisdiction does not turn on the legal sufficiency of the claim; rather, the legal sufficiency of the claim is purely a merits question. See p. 11, *supra*. *Bell*'s rule that a purported federal claim may be dismissed for lack of jurisdiction only if it is frivolous preserves the independence of the jurisdictional and legal-merits inquiries by ensuring that they do not collapse into one another.

Bell's frivolousness standard has no application to the FSIA. Assessing whether a claim falls within a particular statutory grant of jurisdiction is a question of statutory construction. See *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 21-22 (1983). Unlike the federal-question statute, the FSIA establishes substantive federal immunity standards that the court must apply in order to determine

---

[5] *Simon* reaffirmed the D.C. Circuit's reliance on *Bell* in cases like this one, in which both jurisdiction under the expropriation exception in the FSIA and the legal sufficiency of the plaintiff's claim on the merits turn on whether international law prohibited the alleged taking. 812 F.3d at 140. *Simon* clarified, however, that the court will not apply the *Bell* standard in cases in which the plaintiff's claim on the merits does not rely on international law and therefore "the jurisdictional and merits inquiries do not overlap." *Id.* at 141. In *Simon*, the court declined to apply *Bell* because the plaintiffs asserted common-law conversion claims on the merits, and they alleged a taking that violated international law only to establish jurisdiction. *Ibid.*

whether it has jurisdiction. *Verlinden*, 461 U.S. at 497; see pp. 7-10, *supra*; cf. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514-515 (2006) (explaining that Congress may condition subject-matter jurisdiction on satisfying a substantive requirement). In the case of the expropriation exception, one of those substantive standards is whether the case involves "rights in property taken in violation of international law." 28 U.S.C. 1605(a)(3). The expropriation exception therefore requires a legal inquiry that the federal-question statute eschews: jurisdiction under Section 1605(a)(3) turns on the legal sufficiency of the plaintiff's claim that the alleged taking violated international law.

That conclusion adheres to the political Branches' judgment that foreign states should not be subjected to the burden of litigation unless a court "appl[ies] the detailed federal law standards set forth in the Act" and "satisf[ies] itself that one of the exceptions [to immunity] applies." *Verlinden*, 461 U.S. at 494. But the court of appeals' application of the *Bell* standard effectively nullifies the expropriation exception's requirements. Congress would not have anticipated that foreign states would be subject to the burdens of suit for expropriation claims in every case in which the plaintiff makes merely a non-frivolous assertion that the state's conduct violated international law.

B. The Proper Standard For Establishing Jurisdiction Under The Expropriation Exception Warrants This Court's Review

1. The courts of appeals disagree on how to evaluate a district court's jurisdiction over an expropriation claim against a foreign state.

The Second Circuit has held, contrary to the decision below, that the court must determine whether the

complaint's allegations set forth a taking that, if proven, would violate international law. *Zappia Middle E. Constr. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 251-252 (2000) (holding that "breach of a commercial contract alone does not constitute a taking pursuant to international law"). In a subsequent decision, the Second Circuit expressly affirmed that courts must undertake that legal inquiry in determining jurisdiction. See *Robinson* v. *Government of Malay.*, 269 F.3d 133, 143 (2001); accord *id.* at 147 (Sotomayor, J., concurring in the judgment). In discussing *Zappia*, the court explained that "the applicability of the 'expropriation' exception to the FSIA * * * require[s] a determination whether the defendant's conduct violated 'international law'" as a legal matter, even though "the same question—the liability under international law of the foreign government for the behavior of the corporation—would have been presented on the merits." 269 F.3d at 143.

The Fifth, Seventh, and Eleventh Circuits similarly assess the legal sufficiency of the plaintiff's jurisdictional allegations. See, *e.g.*, *de Sanchez* v. *Banco Cent. de Nicar.*, 770 F.2d 1385, 1396, 1395-1397 (5th Cir. 1985) (relevant question is "whether any generally accepted norm of international law prohibits" the foreign state's alleged expropriation; "[i]f not, * * * the foreign state is immune") (emphasis omitted); *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 679-685 (7th Cir. 2012) (plaintiffs' complaint did not contain the elements that the court concluded were necessary to allege a taking in violation of international law); *Mezerhane* v. *República Bolivariana de Venez.*, 785 F.3d 545, 548-551 (11th Cir. 2015) (foreign state was immune because the alleged expropriation of the

property of its national does "not constitute a 'violation of international law'"), cert. denied, 136 S. Ct. 800 (2016).[6]

By contrast, the Ninth Circuit, like the D.C. Circuit, has held that, "[a]t the jurisdictional stage," the court "need not decide," as a legal matter, "whether the taking actually violated international law" to determine whether a claim comes within the expropriation exception. *Siderman de Blake* v. *Republic of Arg.*, 965 F.2d 699, 711 (1992), cert. denied, 507 U.S. 1017 (1993). Rather, "as long as a 'claim is substantial and nonfrivolous, it provides a sufficient basis for the exercise'" of jurisdiction. *Ibid.* (citation omitted).

2. This Court should grant review to resolve the conflict among the courts of appeals. That conflict undermines the FSIA's purpose of fostering the "'develop[ment of] a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32 (1976)). The disagreement may also encourage forum-shopping. Federal venue provisions permit any plaintiff to bring suit against a foreign state in the District of Columbia. 28 U.S.C. 1391(f)(4). The court of appeals' decision therefore may encourage plaintiffs to file expropriation claims in that court

---

[6] Respondents observe (Br. in Opp. 23) that these decisions did not expressly consider whether the *Bell* "frivolousness" standard applies. But each squarely held that courts must determine, as a legal matter, whether the alleged conduct is prohibited by international law, thereby foreclosing any reliance on the frivolousness standard.

so that they may benefit from the D.C. Circuit's permissive approach to jurisdiction.

The appropriate standard for establishing jurisdiction under Section 1605(a)(3) is important. Recognizing that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States," *Verlinden*, 461 U.S. at 493, Congress carefully crafted the FSIA's exceptions to immunity to reflect prevailing customary international-law standards of foreign state immunity, *id.* at 487-488. Section 1605(a)(3) provides a narrow exception to immunity for claims involving "rights in property taken in violation of international law," where there is a specified commercial-activity nexus to the United States. The D.C. Circuit's use of the frivolousness standard, however, effectively nullifies key elements of the immunity analysis whenever the plaintiff's claim purports to rely on international law and the plaintiff can muster a non-frivolous argument that international law recognizes the claim.[7] That permissive approach may result in adverse foreign-relations consequences and reciprocal adverse treatment of the United States in foreign courts. See *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955).

In addition, the court of appeals' approach may extend to other FSIA exceptions that contain require-

---

[7] As discussed above, see note 5, *supra*, the D.C. Circuit does not use the frivolousness standard when the plaintiff's merits claim does not mirror the jurisdictional standard. *Simon*, 812 F.3d at 140-141. Nothing in the FSIA suggests, however, that Congress intended the required jurisdictional showing to vary based on the nature of the plaintiff's claim. In addition, plaintiffs may attempt to recast their claims to take advantage of the frivolousness standard.

ments that parallel the legal merits of the plaintiff's claim. For instance, the terrorism exception provides both an exception to immunity and a right of action for claims for personal injury or death "that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking." 28 U.S.C. 1605A(a)(1) and (c). One district court, relying on *Chabad* and *Simon*, has applied the *Bell* standard to claims brought under that provision. See *Owens* v. *Republic of Sudan*, No. 01-2244, 2016 WL 1170919, at *22-*25 (D.D.C. Mar. 23, 2016) (plaintiffs need only make non-frivolous allegations of legal causation). In addition, the tort exception's requirements may overlap with the merits in some cases, as that exception applies to a claim for personal injury or death "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5); see *Robinson*, 269 F.3d at 143-144 (discussing overlap between jurisdictional and merits inquiries in cases brought under Section 1605(a)(5)).

II. THE COURT OF APPEALS' CONCLUSION THAT RESPONDENTS' EXPROPRIATION CLAIMS ARE NOT FRIVOLOUS DOES NOT WARRANT REVIEW

Petitioners also challenge (Pet. 11-26) the court of appeals' holdings that both H&P-V's and H&P-IDC's claims fell within the expropriation exception. Contrary to petitioners' characterization (Pet. 12, 18), the court's conclusions were not based on a determination that respondents' allegations described conduct that actually constituted a taking that was prohibited by international law. Instead, the court held only that respondents' claims were not frivolous. Pet. App. 17a,

22a. Those conclusions do not warrant this Court's review.

A. The First Question Presented, Concerning Whether H&P-V's Allegations Satisfy Section 1605(a)(3), Does Not Warrant Review

1. H&P-V argues that its expropriation claim satisfied Section 1605(a)(3)'s requirement of a "tak[ing] in violation of international law" because international law prohibits taking the property of a domestic corporation to discriminate against the corporation's foreign shareholders. Pet. App. 13a-17a. Petitioners contend (Pet. 12) that the court of appeals held that respondents' claim "*does* state a [violation of] international law." To the contrary, the court held only that H&P-V's argument was "non-frivolous." Pet. App. 17a. The court based that conclusion primarily on a single fifty-year-old appellate decision. *Id.* at 13a (citing *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), rev'd on other grounds by 376 U.S. 398 (1964)), reaff'd on remand by *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 185 (2d Cir. 1967). In *Sabbatino*, the Second Circuit held that "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders," a court may disregard "the 'nationality' of the corporate fiction." 307 F.2d at 861.

Rather than asking only whether H&P-V's claim was frivolous, the court of appeals should have determined whether a "*generally accepted* norm" of international expropriation law does prohibit taking a domestic corporation's property to discriminate against foreign shareholders. *de Sanchez*, 770 F.2d at 1396 (emphasis added). In the view of the United States, the answer to that question is no. The international

law of expropriation generally imposes no limits on a state's taking of its own national's property. See Restatement (Third) of Foreign Relations of the United States § 712(1) (1987) (requiring without exception that a "taking by the state" must be "of the property of a national of another state" before the taking state is "responsible under international law"); see also *United States* v. *Belmont*, 301 U.S. 324, 332 (1937) (recognizing domestic-takings rule); *Mezerhane*, 785 F.3d at 546, 549-551; *Siderman de Blake*, 965 F.2d at 711. *Sabbatino* is the sole authority that suggests otherwise—but that decision rested on the incorrect premise that international law disregards the nationality of the corporation when it is different from that of most of the shareholders. See 307 F.2d at 861; but cf. *Case Concerning the Barcelona Traction, Light & Power Co. (Belgium* v. *Spain)*, 1970 I.C.J. 3 (Feb. 5), ¶¶ 9, 41 (*Barcelona Traction*) (holding, in case involving alleged expropriation of the property of a Canadian corporation whose shareholders were mostly Belgian nationals, that the corporation was to be treated as a national of its state of incorporation, not the state of its shareholders).[8]

---

[8] Two courts of appeals have permitted plaintiffs to invoke Section 1605(a)(3) in asserting claims that their property was taken in violation of international-law norms against genocide. See *Simon*, 812 F.3d at 142-146; *Abelesz*, 692 F.3d at 674-677. Setting aside whether the expropriation exception encompasses such claims, international-law rules against genocide, unlike the distinct international-law rules governing expropriation, regulate a state's conduct toward its own nationals. Those decisions therefore do not suggest that where genocide is not involved, international law permits a national of a state to assert expropriation claims like those at issue here.

2. The court of appeals' holding that H&P-V's claim is not frivolous does not warrant review.

Petitioners assert (Pet. 12) that the decision below created a circuit split as to whether "pleading a foreign state's discriminatory expropriation of the property of its own nationals *does* state a [violation of] international law." But the decision did not create any such split, because the court of appeals did not actually render such a holding.

The court of appeals did err in permitting H&P-V's claim to proceed under the expropriation exception. But that error stemmed from its use of the frivolousness standard, not definitive legal conclusions about the conduct prohibited by international law. This Court should therefore review the proper standard for establishing jurisdiction under Section 1605(a)(3). See Pt. I, *supra*. Regardless of how the Court disposes of the frivolousness question, the question whether H&P-V's claim satisfies Section 1605(a)(3)'s requirements does not warrant review at this time.

If the Court grants review of the frivolousness question and concludes that Section 1605(a)(3) requires a court to determine whether the plaintiff's allegations actually set forth a violation of international law, that will mean that the court of appeals did not evaluate H&P-V's claim under the correct standard. Rather than granting certiorari now to conduct that inquiry in the first instance, the better course would be to permit the court of appeals to determine whether H&P-V's allegations do state a "tak[ing] in violation of international law." See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Because respondents' briefing before the court of appeals focused solely on

demonstrating that H&P-V's claim was not frivolous, Resps. C.A. Br. 34-44, the parties should have the opportunity to litigate the jurisdictional question under the correct standard.

Conversely, if this Court concludes that the frivolousness standard is correct (or denies certiorari on that question, thereby leaving the frivolousness standard in place), then there is no need for this Court to review the court of appeals' application of that standard to respondents' complaint. The question whether H&P-V's allegations are frivolous lacks significance beyond this case. The general standard of frivolousness is one that lower courts have ample experience applying in a range of contexts. See, *e.g.*, *Shapiro* v. *McManus*, 136 S. Ct. 450, 455 (2015). In addition, reviewing H&P-V's allegations would not provide this Court with an opportunity to decide whether international law actually prohibits discriminatory takings of a national's property in some circumstances.

B. The Second Question Presented, Concerning Whether H&P-IDC's Allegations Satisfy Section 1605(a)(3), Does Not Warrant Review

1. In addressing the second question presented, the court of appeals held only that H&P-IDC's claim that its own "rights in property" were "in issue," 28 U.S.C. 1605(a)(3), was not frivolous. Pet. App. 22a; but cf. Pet. 18. The court acknowledged that because "the corporation and its shareholders are distinct entities," a shareholder generally does not have an ownership interest in the corporation's property. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474-475 (2003). But the court nonetheless held that H&P-IDC "may have rights in" H&P-V's property. Pet. App. 20a. The

court did not examine the source or scope of those potential rights. *Id.* at 20a-22a. The court then concluded, without analysis, that whatever rights H&P-IDC possessed might be "rights in property" for purposes of Section 1605(a)(3), because that provision does not contain any express "limitation" on what constitutes a "right[] in property." *Id.* at 19a.

Because the court of appeals employed the incorrect frivolousness standard, it failed to determine whether respondents' allegations were legally sufficient to place H&P-IDC's "rights in property" in issue. The court should have first examined whether the law of the state of H&P-V's incorporation—Venezuela—gave H&P-IDC, as its shareholder, any direct rights. Municipal law generally accords shareholders "direct rights" related to the corporation that are independent of the rights of the corporation, such as the right to receive dividends or to share in assets upon liquidation. *Barcelona Traction*, 1970 I.C.J. 3, ¶ 47. The court then should have considered whether any such rights constitute "rights in property" for purposes of Section 1605(a)(3). See *Permanent Mission*, 551 U.S. at 198-199 (analyzing rights under New York law and then considering whether they were "rights in immovable property" for purposes of Section 1605(a)(4)). Finally, the court should have determined whether the complaint sufficiently alleges that petitioner's actions constituted a "tak[ing] in violation of international law." 28 U.S.C. 1605(a)(3). While a shareholder's direct rights generally are not implicated by state action that depreciates the value of a corporation's shares, even severely, actions such as taking the shareholder's shares will implicate a shareholder's

direct rights. See generally *Barcelona Traction*, 1970 I.C.J. 3, ¶¶ 44, 47-49.

2. The question whether H&P-IDC's claim is frivolous does not warrant review. Like the question concerning H&P-V's takings claim, the deficiencies in the court of appeals' analysis stem from its use of the frivolousness standard, not from any actual determination of the scope of H&P-IDC's rights in property or any conclusion about what constitutes "rights in property" for purposes of Section 1605(a)(3). And like the question concerning H&P-V's claim, regardless of how the Court disposes of the pleading-standard question, the court of appeals' holding that H&P-IDC's claim could proceed under Section 1605(a)(3) does not warrant review at this time. See pp. 20-21, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the third question presented.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
BRIAN J. EGAN
Legal Adviser
Department of State
SHARON SWINGLE
LEWIS S. YELIN
Attorneys

MAY 2016

Supreme Court, U.S.
FILED
AUG 19 2016
OFFICE OF THE CLERK

No. 15-423

IN THE
Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,

Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

BRUCE D. OAKLEY
HOGAN LOVELLS US LLP
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

Counsel of Record
for Petitioners

DAVID W. OGDEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave, NW
Washington, DC 20006
(202) 663-6440
david.ogden@wilmerhale.com

Counsel of Record
for Respondents

PETITION FOR CERTIORARI FILED OCTOBER 5, 2015
CERTIORARI GRANTED JUNE 28, 2016

TABLE OF CONTENTS

Page

Relevant Docket Entries from the United States District Court for the District of Columbia, No. 11-cv-1735 1

Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 13-7169 (lead) 36

Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 13-7170 (consol.) 47

Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 14-7008 (consol.) 49

Plaintiffs' Complaint (Sept. 23, 2011) 50

District Court's Order (Jan. 11, 2013) 117

District Court's Memorandum Opinion (Sept. 20, 2013)* 124

Court of Appeals' Opinions (May 1, 2015)* 170

* * *

The appendix to the petition for certiorari contains the following material, which is omitted from the Joint Appendix:

District Court's Order (Jan. 6, 2014) 92a

Court of Appeals' Order Denying Panel Rehearing (July 30, 2015) 95a

Court of Appeals' Order Denying Rehearing En Banc (July 30, 2015) 97a

---

* Reprinted here to correct minor typographical errors from the appendix to the petition for certiorari.

Relevant Docket Entries from the United States District Court for the District of Columbia, No. 11-cv-1735

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:11-cv-1735

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
09/23/2011	1	**COMPLAINT against BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Filing fee $ 350, receipt number 4616042497) filed by HELMERICH & PAYNE INTERNATIONAL DRILLING CO., HELMERICH & PAYNE**

DATE	NO.	PROCEEDINGS
		INTERNATIONAL DRILLING CO., HELMERICH & PAYNE DE VENEZUELA, C.A. (Attachments: # 1 Civil Cover Sheet)(rdj) (Entered: 09/28/2011)
08/31/2012	22	MOTION to Dismiss by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Attachments: # 1 Memorandum in Support, # 2 Declaration —Joseph D. Pizzurro, # 3 Exhibit 1— Declaration of Valentina Morales, # 4 Exhibit —2— Declaration of Josaim Trujillo Acosta with Exhibits A—C, # 5 Exhibit —3—Declaration of Adriana Padillo Alfonso with Exhibit A, # 6 Text of Proposed Order, # 7 Certificate of Service)(Pizzurro, Joseph) (Entered: 08/31/2012)
08/31/2012	23	MOTION to Dismiss *Plaintiffs' Complaint Under Rule 12(b)(6)* by BOLIVARIAN REPUBLIC OF VENEZUELA (Attachments: # 1

DATE	NO.	PROCEEDINGS
		Memorandum in Support, # 2 Text of Proposed Order)(Oakley, Bruce) (Entered: 08/31/2012)
08/31/2012	24	MOTION to Dismiss *Plaintiffs' Complaint Pursuant to Foreign Sovereign Immunity* by BOLIVARIAN REPUBLIC OF VENEZUELA (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Oakley, Bruce) (Entered: 08/31/2012)
10/23/2012	29	WITHDRAWN (SEE ORDER 36).... MOTION to Compel by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Text of Proposed Order)(Ogden, David) Modified on 1/14/2013 (jf,). (Entered: 10/23/2012)

DATE	NO.	PROCEEDINGS
11/21/2012	32	Memorandum in opposition to re 29 MOTION to Compel filed by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Declaration —Second Declaration of Adriana Padilla Alfonzo, # 2 Certificate of Service)(Pizzurro, Joseph) (Entered: 11/21/2012)
12/05/2012	33	REPLY to opposition to motion re 29 MOTION to Compel filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Attachments: # 1 Declaration Declaration of David W. Bowker, # 2 Exhibit 1)(Ogden, David) (Entered: 12/05/2012)

DATE	NO.	PROCEEDINGS
01/10/2013	34	**STIPULATION** ***and MOTION (Joint) to Establish a Briefing Schedule for the Adjudication of Defendants' Motions to Dismiss*** **by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Ogden, David) (Entered: 01/10/2013)**
01/11/2013	36	**ORDER granting 35 Joint Motion to Establish a Briefing Schedule. It is hereby ORDERED that 29 Plaintiffs' Motion to Compel Discovery is hereby DENIED without prejudice as withdrawn, and the hearing scheduled for January 14, 2013 is hereby VACATED. The parties shall complete briefing on Defendants' Motions to Dismiss 22 23 24 in accordance with the terms of their stipulation and this Order. Plaintiffs' opposition shall be filed by no later than February 22, 2013, and Defendants' reply briefs**

DATE	NO.	PROCEEDINGS
		shall be filed by no later than March 22, 2013. (SEE ORDER FOR FULL DETAILS). Signed by Judge Robert L. Wilkins on 01/11/2013. (lcrlw3) (Entered: 01/11/2013)
02/22/2013	39	Memorandum in opposition to re 22 MOTION to Dismiss, 24 MOTION to Dismiss *Plaintiffs' Complaint Pursuant to Foreign Sovereign Immunity*, 23 MOTION to Dismiss *Plaintiffs' Complaint Under Rule 12(b)(6)* filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Ogden, David) (Entered: 02/22/2013)
03/22/2013	43	REPLY to opposition to motion re 22 MOTION to Dismiss filed by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Certificate of

DATE	NO.	PROCEEDINGS
		Service)(Pizzurro, Joseph) (Entered: 03/22/2013)
03/22/2013	44	REPLY to opposition to motion re 23 MOTION to Dismiss *Plaintiffs' Complaint Under Rule 12(b)(6)* filed by BOLIVARIAN REPUBLIC OF VENEZUELA. (Oakley, Bruce) (Entered: 03/22/2013)
04/01/2013	45	MOTION to Enforce *the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and Consideration of Defendants' Motions to Dismiss* by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. (Attachments: # 1 Text of Proposed Order)(Ogden, David) (Entered: 04/01/2013)
04/15/2013	46	Memorandum in opposition to re 45 MOTION to Enforce *the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and Consideration*

DATE	NO.	PROCEEDINGS
		of Defendants' Motions to Dismiss filed by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Certificate of Service) (Pizzurro, Joseph) (Entered: 04/15/2013)
04/19/2013	48	REPLY to opposition to motion re 45 MOTION to Enforce *the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and Consideration of Defendants' Motions to Dismiss* filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Ogden, David) (Entered: 04/19/2013)
07/15/2013		Minute Entry for proceedings held before Judge Robert L. Wilkins: Motion Hearing held on 7/15/2013 re 22 MOTION to Dismiss filed by PDVSA PETROLEO, S.A., PETROLEOS DE

DATE	NO.	PROCEEDINGS
		VENEZUELA, S.A., 24 MOTION to Dismiss Plaintiffs' Complaint Pursuant to Foreign Sovereign Immunity filed by BOLIVARIAN REPUBLIC OF VENEZUELA, 45 MOTION to Enforce the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and Consideration of Defendants' Motions to Dismiss filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO., 23 MOTION to Dismiss Plaintiffs' Complaint Under Rule 12(b)(6) filed by BOLIVARIAN REPUBLIC OF VENEZUELA; Argument Heard and this matter is taken under advisement. (Court Reporter Bryan Wayne) (tcb) (Entered: 07/15/2013)

DATE	NO.	PROCEEDINGS
09/20/2013	55	MEMORANDUM AND OPINION re: 22 MOTION to Dismiss, 23 MOTION to Dismiss Plaintiffs' Complaint Under Rule 12(b)(6), 24 MOTION to Dismiss Plaintiffs' Complaint Pursuant to Foreign Sovereign Immunity and 45 MOTION to Enforce the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and Consideration of Defendants' Motions to Dismiss. Signed by Judge Robert L. Wilkins on 9/20/2013. (tcb) (Entered: 09/20/2013)
09/20/2013	56	ORDER re: 22 MOTION to Dismiss, 23 MOTION to Dismiss Plaintiffs' Complaint Under Rule 12(b)(6), 24 MOTION to Dismiss Plaintiffs' Complaint Pursuant to Foreign Sovereign Immunity and 45 MOTION to Enforce the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and

DATE	NO.	PROCEEDINGS
		Consideration of Defendants' Motions to Dismiss; Upon consideration of the parties submissions in connection with Defendants Petrleos de Venezuela, S.A. and PDVSA Petrleo, S.A.s Motion to Dismiss (Dkt. No. 22), Defendant Bolivarian Republic of Venezuelas Motions to Dismiss (Dkt. Nos. 23 & 24), and Plaintiffs Helmerich & Payne International Drilling Co. and Helmerich & Payne de Venezuela, C.A.s Motion to Enforce (Dkt. No. 45), and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby, ORDERED that Defendants Motions to Dismiss (Dkt. Nos. 22, 23, and 24) are TEMPORARILY GRANTED IN PART and DENIED IN PART, and Plaintiffs Motion to Enforce (Dkt. No. 45) is GRANTED. It is FURTHER ORDERED that the parties submit a joint status report by October 1,2013 regarding a schedule for the completion

DATE	NO.	PROCEEDINGS
		of the briefing on Defendants Motions to Dismiss. Signed by Judge Robert L. Wilkins on 9/20/2013. (tcb) (Entered: 09/20/2013)
10/18/2013	59	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 55 Memorandum & Opinion, 56 Order on Motion to Enforce, Order on Motion to Dismiss,,,,,,,,,,,,,,,,,, by PETROLEOS DE VENEZUELA, S.A., PDVSA PETROLEO, S.A.. Filing fee $ 455, receipt number 0090-3505338. Fee Status: Fee Paid. Parties have been notified. (Attachments: # 1 Certificate of Service)(Pizzurro, Joseph) (Entered: 10/18/2013)
10/18/2013	60	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 55 Memorandum & Opinion, 56 Order on Motion to Enforce, Order on Motion to Dismiss,,,,,,,,,,,,,,, by BOLIVARIAN REPUBLIC OF VENEZUELA. Filing fee $ 455, receipt number 0090-3505487. Fee Status:

DATE	NO.	PROCEEDINGS
		Fee Paid. Parties have been notified. (Monts, William) (Entered: 10/18/2013)
10/28/2013	63	MOTION for Entry of Final Judgment *(Partial) Pursuant to Rule 54(b) with Respect to Helmerich & Payne de Venezuela, C.A.'s Expropriation Claim Or, in the Alternative*, MOTION for Certification for interlocatory appeal *Under 28 U.S.C. 1292(b)* by HELMERICH & PAYNE DE VENEZUELA, C.A. (Attachments: # 1 Text of Proposed Order)(Ogden, David) (Entered: 10/28/2013)
11/11/2013	64	Memorandum in opposition to re 63 MOTION for Entry of Final Judgment *(Partial) Pursuant to Rule 54(b) with Respect to Helmerich & Payne de Venezuela, C.A.'s Expropriation Claim Or, in the Alternative*, MOTION for Certification for interlocatory appeal Under 28 U.S.C. 1292(b) filed by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA

DATE	NO.	PROCEEDINGS
		PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Certificate of Service) (Pizzurro, Joseph) (Entered: 11/11/2013)
11/18/2013	65	REPLY to opposition to motion re 63 MOTION for Entry of Final Judgment *(Partial) Pursuant to Rule 54(b) with Respect to Helmerich & Payne de Venezuela, C.A.'s Expropriation Claim Or, in the Alternative*, MOTION for Certification for interlocatory appeal Under 28 U.S.C. 1292(b) filed by HELMERICH & PAYNE DE VENEZUELA, C.A.. (Ogden, David) (Entered: 11/18/2013)
01/06/2014	66	ORDER granting 63 MOTION for Entry of Final Judgment (Partial) Pursuant to Rule 54(b) with Respect to Helmerich & Payne de Venezuela, C.A.'s Expropriation Claim Or, in the Alternative,, MOTION for Certification for interlocatory appeal Under

DATE	NO.	PROCEEDINGS
		28 U.S.C. 1292(b); It is further ORDERED that final judgment is hereby entered in favor of Defendants with respect to H&P-Vs expropriation claim. This is a final and appealable order. Signed by Judge Robert L. Wilkins on 1/6/2014. (tcb) (Entered: 01/06/2014)
01/14/2014	67	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 66 Order on Motion for Entry of Final Judgment, Order on Motion for Certification for Interlocatory Appeal,, 55 Memorandum & Opinion, 56 Order on Motion to Enforce, Order on Motion to Dismiss,,,,,,,,, by HELMERICH & PAYNE DE VENEZUELA, C.A.. Filing fee $ 505, receipt number 0090-3591473. Fee Status: Fee Paid. Parties have been notified. (Attachments: # 1 Certificate of Service)(Ogden, David) (Entered: 01/14/2014)

DATE	NO.	PROCEEDINGS
01/24/2014		Case reassigned to the Calendar Committee who will oversee it until it is reassigned to another judge. Judge Robert L. Wilkins has been elevated to the U.S. Court of Appeals for DC and is no longer assigned to the case. Any questions should be directed to Terri Barrett, formerly Judge Wilkins deputy clerk, at 202-354-3179 or terri barrett@dcd.uscourts.gov. (ztnr,) (Entered: 01/24/2014)
04/07/2014		Case directly reassigned to Judge Christopher R. Cooper. Calendar Committee no longer assigned to the case. (gt,) (Entered: 04/07/2014)
09/08/2015	72	MANDATE of USCA (certified copy) as to 59 Notice of Appeal to DC Circuit Court, filed by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A., 60 Notice of Appeal to DC Circuit Court, filed by BOLIVARIAN REPUBLIC OF VENEZUELA, 67 Notice

DATE	NO.	PROCEEDINGS
		of Appeal to DC Circuit Court, filed by HELMERICH & PAYNE DE VENEZUELA, C.A. ORDERED and ADJUDGED that the District Court's denial of Venezuela's motion to dismiss H&P—IDC's expropriation claim be affirmed. In all other respects, the order is hereby reversed and the case remanded for further proceedings, in accordance with the opinion of the court filed herein this date. USCA Case Number 13-7169; Consolidated with 13-7170 and 14-7008. (rd) (Entered: 09/09/2015)
10/01/2015		Minute Entry for proceedings held before Judge Christopher R. Cooper: Status Conference held on 10/1/2015. (Court Reporter LISA MOREIRA.) (mac) (Entered: 10/01/2015)

DATE	NO.	PROCEEDINGS
10/02/2015	73	ORDER: It is hereby ORDERED that the parties shall meet and confer and, no later than October 16, 2015, jointly propose a scheduling order, or separate scheduling orders if agreement cannot be reached, concerning the timing of jurisdictional discovery and the subsequent briefing of motions to dismiss for lack of jurisdiction and/or for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Signed by Judge Christopher R. Cooper on 10/2/2015. (lccrc3) (Entered: 10/02/2015)
10/19/2015	77	SCHEDULING ORDER: It is hereby ORDERED that Defendants shall, within 21 days of this Order, confirm and, if necessary, supplement the factual basis for their defense that the Court lacks subject matter jurisdiction over the PDVSA defendants under § 1605(a)(3). It is further ORDERED that the parties shall adhere to the following

DATE	NO.	PROCEEDINGS
		schedule for jurisdictional discovery and briefing unless instructed otherwise by subsequent order: Jurisdictional discovery will commence as of the date of this scheduling order; Jurisdictional discovery will close on the 180th day thereafter; Defendants will file their Rule 12(b)(6) motion on the issues discussed in 73 this Court's Order dated October 2, 2015 within 45 days from the close of jurisdictional discovery; Plaintiffs will file their consolidated opposition brief, addressing both Defendants' Rule 12(b)(1) and Rule 12(b)(6) motions, within 60 days of service of Defendants' 12(b)(6) motion; Defendants will conduct responsive discovery, if any, and file a consolidated reply within 60 days of service of Plaintiffs' consolidated opposition. SEE ATTACHED ORDER FOR FULL DETAILS. Signed by Judge Christopher R. Cooper on

DATE	NO.	PROCEEDINGS
		10/19/2015. (lccrc3) (Entered: 10/19/2015)
11/09/2015	78	NOTICE *of Factual Basis of Defendants' Jurisdictional Defense* by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Pizzurro, Joseph) (Entered: 11/09/2015)
01/20/2016	81	MOTION to Compel *(Redacted Version)* by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. (Attachments: # 1 Text of Proposed Order Granting Plaintiffs' Motion to Compel, # 2 Declaration of David W. Bowker in Support of Plaintiffs' Motion to Compel, # 3 Exhibit 1, # 4 Exhibit 2, # 5 Exhibit 3, # 6 Exhibit 4, # 7 Exhibit 5, # 8 Exhibit 6, # 9 Exhibit 7, # 10 Exhibit 8, # 11 Exhibit 9, # 12 Exhibit 10, # 13 Exhibit 11, # 14 Exhibit 12, # 15 Exhibit 13,

DATE	NO.	PROCEEDINGS
		# 16 Exhibit 14, # 17 Exhibit 15, # 18 Exhibit 16, # 19 Exhibit 17, # 20 Exhibit 18, # 21 Exhibit 19, # 22 Exhibit 20, # 23 Exhibit 21, # 24 Exhibit 22, # 25 Exhibit 23, # 26 Exhibit 24, # 27 Exhibit 25, # 28 Exhibit 26, # 29 Exhibit 27, # 30 Exhibit 28, # 31 Exhibit 29, # 32 Exhibit 30, # 33 Exhibit 31, # 34 Exhibit 32, # 35 Exhibit 33, # 36 Exhibit 34, # 37 Exhibit 35)(Ogden, David) (Entered: 01/20/2016)
02/05/2016	84	NOTICE *Joint Notice of Discovery Dispute and Request For Extension* by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. re 81 MOTION to Compel *(Redacted Version)* (Pizzurro, Joseph) (Entered: 02/05/2016)
02/08/2016		MINUTE ORDER: In light of 84 the parties' Joint Notice of Discovery Dispute and Request for Extension, it is hereby ORDERED that Defendants' opposition to Plaintiffs motion to compel,

DATE	NO.	PROCEEDINGS
		including Defendants' cross-motion for a protective order, be due February 12, 2016. If the Court deems necessary, after briefing, it shall set a hearing on the motions in a subsequent order. Signed by Judge Christopher R. Cooper on 2/8/16. (lccrc3) (Entered: 02/08/2016)
02/12/2016	85	Joint MOTION for Protective Order by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Attachments: # 1 Declaration —Joseph D. Pizzurro, # 2 Exhibit —1, # 3 Exhibit —2, # 4 Exhibit —3, # 5 Exhibit —4, # 6 Exhibit —5, # 7 Memorandum in Support, # 8 Text of Proposed Order, # 9 Certificate of Service) (Pizzurro, Joseph) (Entered: 02/12/2016)

DATE	NO.	PROCEEDINGS
02/12/2016	87	MEMORANDUM by BOLIVARIAN REPUBLIC OF VENEZUELA. (Oakley, Bruce) (Entered: 02/12/2016)
02/19/2016	94	SEALED OPPOSITION filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. re 85 Joint MOTION for Protective Order :(See Docket Entry No. 90 to view documents)(ztd) (Entered: 03/02/2016)
02/29/2016	91	REPLY to opposition to motion re 85 Joint MOTION for Protective Order, 81 MOTION to Compel *(Redacted Version)* *(Redacted & Corrected Version)* filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Attachments: # 1 Declaration of David W. Bowker, # 2 Exhibit 36, # 3 Exhibit 37, # 4 Exhibit 38,

DATE	NO.	PROCEEDINGS
		# 5 Exhibit 39, # 6 Exhibit 40, # 7 Exhibit 41, # 8 Exhibit 42)(Ogden, David) (Entered: 02/29/2016)
02/29/2016	92	ORDER entering 86 Stipulated Discovery and Confidentiality Order. Signed by Judge Christopher R. Cooper on 2/29/16. (lccrc3) (Entered: 02/29/2016)
03/11/2016	95	Joint MOTION to Stay by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order, # 3 Certificate of Service) (Pizzurro, Joseph) (Entered: 03/11/2016)
03/28/2016	96	Memorandum in opposition to re 95 Joint MOTION to Stay filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Attachments: # 1

DATE	NO.	PROCEEDINGS
		Declaration of David W Bowker, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5)(Ogden, David) (Entered: 03/28/2016)
04/07/2016	99	REPLY to opposition to motion re 95 Joint MOTION to Stay filed by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Certificate of Service)(Pizzurro, Joseph) (Entered: 04/07/2016)
04/12/2016		Minute Entry for proceedings held before Judge Christopher R. Cooper: Motion Hearing held on 4/12/2016 re Defendants' 85 Joint MOTION for Protective Order, Defendants' 95 Joint MOTION to Stay, Plaintiffs' 81 MOTION to Compel(Redacted Version); Argument heard and these matters are taken under advisement. (Court Reporter

DATE	NO.	PROCEEDINGS
		Lisa Moreira) (tcr) (Entered: 04/13/2016)
04/19/2016		SEALED MINUTE ORDER: It is hereby ORDERED that, no later than Friday, April 22, 2016, Defendants respond, by surreply not to exceed 5 pages, to Plaintiffs' argument, made on page 17 of their consolidated reply memorandum, that evidence of a "meeting on 05-24-2010 between PDVSA Servicios and the H&P Vice-presidency in Houston," Pls.' Ex. 40 at 5, and the reference in a presentation by PDVSA-SP to four pieces of equipment "that are being purchased in Houston," Pls.' Ex. 41 at 4, 20, "rebut the PDVSA Defendants' answer to PDVSA Interrogatory 17 that neither [PDVSA-S] nor [PDVSA-SP] engages in commercial activity in the United States," PDVSA Opp'n 32.(This document is SEALED and only available to authorized persons.)Signed by Judge Christopher R. Cooper on 4/19/2016.(ztcr) (Entered:

DATE	NO.	PROCEEDINGS
		04/19/2016)
04/22/2016	101	SURREPLY to re 85 Joint MOTION for Protective Order, 81 MOTION to Compel (Redacted Version) filed by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Declaration -Juan O. Perla, # 2 Exhibit -1, # 3 Exhibit -2, # 4 Exhibit -3, # 5 Exhibit -4, # 6 Exhibit -5, # 7 Exhibit -6, # 8 Exhibit -7, # 9 Exhibit -8, # 10 Certificate of Service) (Pizzurro, Joseph) (Entered: 04/22/2016)
04/26/2016	102	NOTICE *of PDVSA Defendants' Statement Regarding Discovery Dispute* by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Pizzurro, Joseph) (Entered: 04/26/2016)
04/26/2016	104	NOTICE *of Plaintiffs' Statement Regarding Discovery Dispute* by HELMERICH & PAYNE

DATE	NO.	PROCEEDINGS
		DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. (Attachments: # 1 Declaration of David W. Bowker, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12, # 14 Exhibit 13, # 15 Exhibit 14)(Ogden, David) (Entered: 04/26/2016)
04/29/2016	105	MOTION for Leave to File *Supplemental Memorandum in Support of Plaintiffs' Motion to Compel and in Opposition to Defendants' Cross—Motion for Entry of Protective Order by* HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. (Ogden, David) (Entered: 04/29/2016)

DATE	NO.	PROCEEDINGS
05/02/2016		MINUTE ORDER granting 105 Plaintiffs' Motion for Leave to File: It is hereby ORDERED that Plaintiffs may, no later than May 4, 2016, file a three-page supplemental memorandum of law responding to Petrleos de Venezuela, S.A.'s and PDVSA Petrleo, S.A.'s April 22, 2016 filing, submitted in response to this Courts April 19, 2016 Order. Signed by Judge Christopher R. Cooper on 5/2/2016. (lccrc3) (Entered: 05/02/2016)
05/02/2016		MINUTE ORDER: Having considered the parties' 102, 104 statements regarding discovery dispute, it is hereby ORDERED that the PDVSA Defendants produce to Plaintiffs, no later than May 9, 2016, complete copies of the five sample pages requested. Signed by Judge Christopher R. Cooper on 5/2/2016. (lccrc3) (Entered: 05/02/2016)

DATE	NO.	PROCEEDINGS
05/04/2016	109	SUPPLEMENTAL MEMORANDUM to filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Attachments: # 1 Declaration of David W. Bowker, # 2 Exhibit 43, # 3 Exhibit 44)(Ogden, David) (Entered: 05/04/2016)
05/06/2016	111	MOTION for Leave to File *Memorandum In Response To Plaintiffs' Supplemental Memorandum of Law In Support of Plaintiffs' Motion To Compel* by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Attachments: # 1 Certificate of Service)(Pizzurro, Joseph) (Entered: 05/06/2016)
05/06/2016		MINUTE ORDER: A telephonic conference re 111 PDVSA Defendants' Motion for Leave to File has been set for Monday, May 9, 2016 at 2:30 PM before Judge Christopher R. Cooper.

DATE	NO.	PROCEEDINGS
		Signed by Judge Christopher R. Cooper on 5/6/2016. (lccrc3) (Entered: 05/06/2016)
05/09/2016		Minute Entry for proceedings held before Judge Christopher R. Cooper: Telephone Conference held on 5/9/2016. Matter taken under advisement. (Court Reporter: Crystal Pilgrim). (kt) (Entered: 05/09/2016)
05/10/2016		MINUTE ORDER: It is hereby ORDERED that 111 PDVSA Defendants' Motion for Leave to File be DENIED as moot in light of the telephonic conference held on May 9, 2016. Signed by Judge Christopher R. Cooper on 5/10/2016. (lccrc3) (Entered: 05/10/2016)
05/13/2016	112	MEMORANDUM OPINION re: Plaintiffs' 81 Motion to Compel and 83 Sealed Motion and Defendants' 85 Joint Motion for a Protective Order; Defendants' 95 Joint Motion to Stay.(This document is SEALED and only available to authorized

DATE	NO.	PROCEEDINGS
		persons.)Signed by Judge Christopher R. Cooper on 5/13/2016.(ztcr) (Entered: 05/13/2016)
05/13/2016	113	ORDER granting in part and denying in part Plaintiffs' 81 Motion to Compel and 83 Sealed Motion and Defendants' 85 Joint Motion for a Protective Order; denying Defendants' 95 Joint Motion to Stay. Signed by Judge Christopher R. Cooper on 5/13/2016. (tcr) (Entered: 05/13/2016)
05/13/2016	114	REDACTED MEMORANDUM OPINION re: Plaintiffs' 81 Motion to Compel and 83 Sealed Motion and Defendants' 85 Joint Motion for a Protective Order; Defendants' 95 Joint Motion to Stay. Signed by Judge Christopher R. Cooper on 5/13/2016. (lccrc3) (Entered: 05/13/2016)
05/23/2016	116	SCHEDULING ORDER approving 115 the parties' proposed schedule for the completion of jurisdictional discovery. It is further

DATE	NO.	PROCEEDINGS
		ORDERED that, while the parties may stipulate to alterations to interim deadlines, any extension of the close of jurisdictional discovery shall be by Court order only on a showing of good cause. Signed by Judge Christopher R. Cooper on 5/23/16. (lccrcl) (Entered: 05/23/2016)
05/25/2016	117	**MOTION for Reconsideration re 113 Order on Motion to Compel, Order on Motion for Protective Order, Order on Motion to Stay,,, 114 Memorandum & Opinion, by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Attachments: # 1 Exhibit 15-423 Brief for the United States as Amicus Curiae)(Monts, William) (Entered: 05/25/2016)**
05/31/2016	118	**NOTICE *of Opposition to Defendants' Motion for Reconsideration* by HELMERICH & PAYNE**

DATE	NO.	PROCEEDINGS
		DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. re 117 MOTION for Reconsideration re 113 Order on Motion to Compel, Order on Motion for Protective Order, Order on Motion to Stay,,, 114 Memorandum & Opinion, (Ogden, David) (Entered: 05/31/2016)
06/08/2016	122	Memorandum in opposition to re 117 MOTION for Reconsideration re 113 Order on Motion to Compel, Order on Motion for Protective Order, Order on Motion to Stay,,, 114 Memorandum & Opinion, filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Attachments: # 1 Exhibit A)(Ogden, David) (Entered: 06/08/2016)
06/15/2016	123	REPLY to opposition to motion re 117 MOTION for Reconsideration re 113

DATE	NO.	PROCEEDINGS
		Order on Motion to Compel, Order on Motion for Protective Order, Order on Motion to Stay,,, 114 Memorandum & Opinion, filed by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Pizzurro, Joseph) (Entered: 06/15/2016)
06/28/2016	124	ORDER denying as moot 117 Defendants' Motion for Reconsideration; staying all proceedings in this action, including jurisdictional discovery, pending the Supreme Court's resolution of the question presented in Bolivarian Republic of Venezuela v. Helmerich and Payne International Drilling Co., No. 15-423. Signed by Judge Christopher R. Cooper on 6/28/2016. (lccrc3) (Entered: 06/28/2016)

Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 13-7169 (lead)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7169

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/25/2013	NOTICE OF APPEAL filed [1463030] by PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. seeking review of a decision by the U.S. District Court in 1:11-cv-01735-RLW. Assigned USCA Case Number [13-7169].

DATE	PROCEEDINGS
10/25/2013	CLERK'S ORDER filed [1463127] consolidating cases 13-7170 (Consolidation started 10/25/2013) with 13-7169; directing party to file initial submissions: APPELLANT docketing statement due 11/25/2013. APPELLANT certificate as to parties, etc. due 11/25/2013. APPELLANT statement of issues due 11/25/2013. APPELLANT underlying decision due 11/25/2013. APPELLANT deferred appendix statement due 11/25/2013. APPELLANT notice of appearance due 11/25/2013. APPELLANT transcript status report due 11/25/2013. APPELLANT procedural motions due 11/25/2013. APPELLANT dispositive motions due 12/09/2013; directing party to file initial submissions: APPELLEE certificate as to parties, etc. due 11/25/2013. APPELLEE entry of appearance due 11/25/2013. APPELLEE procedural motions due 11/25/2013. APPELLEE dispositive motions due 12/09/2013 [13-7169, 13-7170]

DATE	PROCEEDINGS
03/10/2014	CLERK'S ORDER filed [1483094] setting briefing schedule and format: DEFENDANT-APPELLANTS Joint Principal Brief due 05/12/2014. APPENDIX due 05/12/2014. DEFENDANT-APPELLEES/CROSS-APPELLANTS Joint Principal and Response Brief due 07/11/2014. DEFENDANT-APPELLANTS/ CROSS-APPELLEES Joint Response and Reply Brief due 08/25/2014. DEFENDANT-CROSS APPELLANTS Joint Reply Brief due 09/24/2014. The parties will be notified by separate order of the oral argument date and composition of the merits panel. [13-7169, 13-7170, 14-7008]
05/12/2014	APPELLANT BRIEF [1492572] filed by PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7169, Bolivarian Republic of Venezuela in 13-7170 [Service Date: 05/12/2014] Length of Brief: 13,781. [13-7169, 13-7170, 14-7008] (Pizzurro, Joseph)

DATE	PROCEEDINGS
05/12/2014	*JOINT* APPENDIX [1492577] filed by PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Bolivarian Republic of Venezuela in 13-7169. [Volumes: 2] [Service Date: 05/12/2014] [13-7169, 13-7170, 14-7008] (Pizzurro, Joseph)
05/12/2014	SEALED APPENDIX (Volume III of III) [1492964] filed by PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Bolivarian Republic of Venezuela, Helmerich & Payne De Venezuela, C.A. and Helmerich & Payne International Drilling Co. in 13-7169, Bolivarian Republic of Venezuela and Helmerich & Payne De Venezuela, C.A., Helmerich & Payne International Drilling Co., PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7170, Helmerich & Payne De Venezuela, C.A. and Bolivarian Republic of Venezuela, Helmerich & Payne International Drilling Co., PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 14-7008. [Volumes: 1] [Service Date: 05/12/2014] [13-7169, 13-7170, 14-7008]

DATE	PROCEEDINGS
07/11/2014	**APPELLEE & CROSS-APPELLANT BRIEF** [1502235] filed by Helmerich & Payne De Venezuela, C.A. and Helmerich & Payne International Drilling Co. in 13-7169, 13-7170, Helmerich & Payne De Venezuela, C.A. in 14-7008 [Service Date: 07/11/2014] Length of Brief: 16,470. [13-7169, 13-7170, 14-7008] (Ogden, David)
08/25/2014	**APPELLANT REPLY & CROSS APPELLEE BRIEF** [1509209] filed by PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Bolivarian Republic of Venezuela in 13-7169, Bolivarian Republic of Venezuela and PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7170, Bolivarian Republic of Venezuela, PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 14-7008 [Service Date: 08/25/2014] Length of Brief: 13,895. [13-7169, 13-7170, 14-7008] (Pizzurro, Joseph)
09/24/2014	**CROSS-APPELLANT REPLY BRIEF** [1513917] filed by Helmerich & Payne De Venezuela, C.A. in 14-7008 [Service Date: 09/24/2014] Length of Brief: 5,165 Words. [14-7008, 13-7169, 13-7170] (Ogden, David)

DATE	PROCEEDINGS
01/16/2015	ORAL ARGUMENT HELD before Judges Garland, Tatel and Sentelle. [13-7169, 13-7170, 147008]
05/01/2015	PER CURIAM JUDGMENT filed [1550132] that the District Court's denial of Venezuela's motion to dismiss H&P-IDC's expropriation claim be affirmed. In all other respects, the order is hereby reversed and the case remanded for further proceedings, for the reasons in the accompanying opinion. Before Judges: Garland, Tatel and Sentelle. [13-7169, 13-7170, 14-7008]
05/01/2015	OPINION filed [1550133] (Pages: 22) for the Court by Judge Tatel, CONCURRING/DISSENTING OPINION (Pages: 5) by Judge Sentelle [13-7169, 13-7170, 14-7008]

DATE	PROCEEDINGS
05/29/2015	PETITION filed [1554872] by Appellants PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Appellee Bolivarian Republic of Venezuela in 13-7169, Appellant Bolivarian Republic of Venezuela and Appellees PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7170, Appellees Bolivarian Republic of Venezuela, PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 14-7008 for rehearing, for rehearing en banc. [Service Date: 05/29/2015 by CM/ECF NDA] Pages: 21-30. [13-7169, 13-7170, 14-7008] (Monts, William)
06/03/2015	CLERK'S ORDER filed [1555418] directing response to petition for rehearing en banc [1554872-3] The response may not exceed 15 pages. Response to Petition due 06/18/2015 [13-7169, 13-7170, 14-7008]

DATE	PROCEEDINGS
06/18/2015	RESPONSE FILED [1558223] by Helmerich & Payne De Venezuela, C.A. and Helmerich & Payne International Drilling Co. in 13-7169, 13-7170, 14-7008 to petition for rehearing [1554872-2], petition for rehearing en banc [1554872-3] [Service Date: 06/18/2015 by CM/ECF NDA] Pages: 11-15. [13-7169, 13-7170, 14-7008] (Ogden, David)
06/23/2015	MOTION filed [1559218] by PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Bolivarian Republic of Venezuela in 13-7169, Bolivarian Republic of Venezuela and PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7170, Bolivarian Republic of Venezuela, PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 14-7008 for leave to file reply (Response to Motion served by mail due on 07/09/2015) [Service Date: 06/23/2015 by CM/ECF NDA] Pages: 1-10. [13-7169, 13-7170, 14-7008] (Monts, William)

DATE	PROCEEDINGS
06/24/2015	REPLY LODGED [1559325] by PDVSA Petroleo, S.A., Petroleos Do Venezuela, S.A. and Bolivarian Republic of Venezuela in 13-7169, Bolivarian Republic of Venezuela and PDVSA Petroleo, S.A. and Petroleos Do Venezuela, S.A. in 13-7170, Bolivarian Republic of Venezuela, PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 14-7008 (letter reply brief separately lodged pursuant to request from Clerk's Office). [Service Date: 06/24/2015] [13-7169, 13-7170, 14-7008]-[Edited 08/12/2015 by SHA-Document Lodged by Cleric's Office] (Monts, Wiliam)
07/30/2015	PER CURIAM ORDER filed [1565462] denying petition for rehearing [1554872-2]. Before Judges: Garland, Tatel and Sentelle*. [13-7169, 13-7170, 14-7008]

DATE	PROCEEDINGS
07/30/2015	PER CURIAM ORDER, En Banc, filed [1565463] denying appellees/cross-appellants' motion for leave to file reply in support of their petition for panel rehearing and rehearing en banc, and the lodged reply [1559218-2]. The Clerk is directed to note the docket accordingly. Before Judges: Garland, Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, Wilkins*, and Sentelle. [13-7169, 13-7170, 14-7008]
07/30/2015	PER CURIAM ORDER, En Banc, filed [SEE ORDER FOR DETAILS] [1565465] denying petition for rehearing en banc [1554872-3] Before Judges: Garland, Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins*. [13-7169, 13-7170, 14-7008]
08/05/2015	MOTION filed [1566326] by PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Bolivarian Republic of Venezuela in 13-7169, Bolivarian Republic of Venezuela and PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7170, Bolivarian Republic of Venezuela, PDVSA Petroleo, S.A.

DATE	PROCEEDINGS
	and Petroleos De Venezuela, S.A. in 14-7008 to stay mandate (Response to Motion served by mail due on 08/20/2015) [Service Date: 08/05/2015 by CM/ECF NDA] Pages: 11-15. [13-7169, 13-7170, 147008] (Monts, William)
08/20/2015	RESPONSE IN OPPOSITION FILED [1568871] by Helmerich & Payne De Venezuela, C.A. and Helmerich & Payne International Drilling Co. in 13-7169, 13-7170, 14-7008 to motion to stay mandate [1566326-2] [Service Date: 08/20/2015 by CM/ECF NDA] Pages: 11-15. [13-7169, 13-7170, 14-7008] (Ogden, David)
08/25/2015	PER CURIAM ORDER filed [1569630] denying appellants/cross-appellees' motion to stay mandate [1566326-2] Before Judges: Garland, Tatel and Sentelle. [13-7169, 13-7170, 14-7008]
09/03/2015	MANDATE ISSUED to Clerk, District Court [13-7169, 13-7170, 14-7008]

Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 13-7170 (consol.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7170

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/25/2013	NOTICE OF APPEAL filed [1463034] by Bolivarian Republic of Venezuela seeking review of a decision by the U.S. District Court in 1:11-cv-01735-RLW. Assigned USCA Case Number [13-7170]

DATE	PROCEEDINGS
10/25/2013	CLERK'S ORDER filed [1463127] consolidating cases 13-7170 (Consolidation started 10/25/2013) with 13-7169; directing party to file initial submissions: APPELLANT docketing statement due 11/25/2013. APPELLANT certificate as to parties, etc. due 11/25/2013. APPELLANT statement of issues due. 11/25/2013. APPELLANT underlying decision due 11/25/2013. APPELLANT deferred appendix statement due 11/25/2013. APPELLANT notice of appearance due 11/25/2013. APPELLANT transcript status report due 11/25/2013. APPELLANT procedural motions due 11/25/2013. APPELLANT dispositive motions due 12/09/2013; directing party to file initial submissions: APPELLEE certificate as to parties, etc. due 11/25/2013. APPELLEE entry of appearance due 11/25/2013. APPELLEE procedural motions due 11/25/2013. APPELLEE dispositive motions due 12/09/2013 [13-7169, 13-7170]

Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 14-7008 (consol.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7008

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
01/17/2014	NOTICE OF APPEAL filed [1477152] by Helmerich & Payne De Venezuela, C.A. seeking review of a decision by the US. District Court in 1:11-cv-01735-RLW. Assigned USCA Case Number [14-7008]
01/29/2014	CLERK'S ORDER filed [1477312] consolidating cases 14-7008 (Consolidation started 01/29/2014) with 13/7169 [13-7169, 13-7170, 14-7008]

Plaintiffs' Complaint (Sept. 23, 2011)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:11-cv-01735

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and
HELMERICH & PAYNE DE VENEZUELA, C.A.
1437 South Boulder Avenue
Tulsa, Oklahoma 74119

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
Dr. Carlos Escarra Malave
Procurador General de la República
Av. Los Illustres, cruce con calle
Francisco Iazo Martí
Edificio Procuraduría General de la República
Piso 8., Urb. Santa Mónica
Caracas 1040
VENEZUELA

PETRÓLEOS DE VENEZUELA, S.A.,
Avenida Libertador La Campiña, Apartado 169
Caracas 1010-A
VENEZUELA

and PDVSA PETRÓLEO, S.A.,
Avenida Libertador La Campiña, Apartado 169
Caracas 1060
VENEZUELA

Defendants.

Filed: September 23, 2011

COMPLAINT

INTRODUCTION

1. This is an action brought by an American oil-drilling company and its wholly-owned subsidiary against the Venezuelan government and its agencies and instrumentalities that operate Venezuela's state-owned oil company:

(a) under the expropriation exception to immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3), to redress defendants' 2010 seizure of Plaintiffs' long-established Venezuelan oil drilling business, including eleven fully operational oil drilling rigs and all associated equipment, infrastructure, and personal and real property, without just compensation, in violation of international law; and

(b) under the commercial activities exception to immunity under the FSIA, 28 U.S.C. § 1605(a)(2), to redress flagrant, ongoing breaches of contract by defendants, who are engaged in commercial activity in Venezuela and the United States and whose breaches of contracts with

plaintiffs have caused and continue to cause direct effects in the United States.

2. For more than 55 years and continuing until 2010, plaintiff Helmerich & Payne de Venezuela, C.A. ("H&P-V") and its predecessors have provided contract oil and gas drilling services in Venezuela. H&P-V is a wholly owned subsidiary of Tulsa, Oklahoma-based plaintiff Helmerich & Payne International Drilling Co. ("H&P-IDC"). For the last 14 years, H&P-V has provided contract drilling services exclusively to Venezuelan state-owned entities, including defendants Petróleos de Venezuela, S.A. ("PDVSA") and PDVSA Petróleo, S.A. ("PDVSA-P") that by law enjoy a monopoly on Venezuela's oil reserves. Defendants the Bolivarian Republic of Venezuela ("Venezuela"), PDVSA, and PDVSA-P hereafter are referred to collectively as "Defendants." PDVSA and PDVSA-P are hereafter referred to collectively as "the PDVSA Defendants." Plaintiffs H&P-IDC and H&P-V are hereafter referred to collectively as "H&P" or "Plaintiffs."

3. On or about June 12, 2010, without prior warning, employees of the PDVSA Defendants and, upon information and belief, armed and uniformed soldiers of the Venezuelan National Guard, surrounded and unlawfully blockaded the business premises of H&P-V's drilling operations in Ciudad Ojeda, in the western region of Venezuela. On or about June 13 and 14, 2010, employees of the PDVSA Defendants and armed and uniformed soldiers of the Venezuelan National Guard surrounded and unlawfully blockaded the business premises of H&P-V's drilling operations in Anaco, in the eastern region of Venezuela, at that time H&P-V's headquarters in Venezuela. On information and

belief, in effectuating both blockades, the employees of the PDVSA Defendants and the Venezuelan National Guard soldiers acted at the direction of Defendant Venezuela and its anti-American and authoritarian President Hugo Chávez and/or his Minister of Energy and Petroleum Rafael Ramírez. The blockade was for the purposes of seizing H&P-V's assets, preventing H&P-V from relocating any assets from its yards, and intimidating H&P into forgiving long-outstanding debts of the PDVSA Defendants and into continuing to provide drilling services to the PDVSA Defendants without having been paid for work that H&P-V had already completed on prior contracts. On information and belief, although ordered and directed by senior officials of the Venezuelan government, this seizure of H&P's assets was outside the scope of any colorable Venezuelan legal authority.

4. More than two weeks later, on June 29, 2010, with the unlawful blockades of H&P-V's business premises still in effect, Defendant Venezuela, acting through the Venezuelan National Assembly, issued a "Bill of Agreement" declaring H&P-V's property to be of "public benefit and good" and recommending that President Chávez issue a "Decree of Expropriation." That same day, President Chávez issued "Presidential Decree No. 7532," directing Defendant PDVSA "or its designee affiliate" to complete what President Chávez called the "forcible taking" of H&P-V's oil drilling rigs and "all the personal and real property and other improvements made by [the] company" (hereinafter, "Expropriation Decree"). At Defendant Venezuela's and President Chávez's direction, the PDVSA

Defendants took possession of H&P-V's assets, and assumed all of H&P-V's oil-drilling operations.

5. With the expropriation complete, Minister Ramírez — who serves simultaneously as Minister of Energy and Petroleum and as President of Defendant PDVSA — appeared at the entrance to H&P-V's yard in Anaco to address a large, pre-planned political rally of employees of the PDVSA Defendants, armed and uniformed Venezuelan National Guard soldiers, and others. Minister/President Ramírez declared:

> [W]e send our kind regards of solidarity to Commander Hugo Chávez. Long live Commander Chávez! Long live the Bolivarian Revolution! Long live the oil workers! At this moment . . . the Venezuelan Government . . . is taking control over this drill company which has been nationalized by the revolution.
>
> The company Helmerich & Payne . . . has operated in our country for many years . . . Today, the Revolutionary Government took control over that company . . .
>
> You have been here guarding assets that now belong to the Venezuelan State. I acknowledge and appreciate your constant watch in order to protect the people's interests . . . . Revolutionary salutation: Socialist Nation or Death. We shall be victorious!

Minister/President Ramírez also condemned what he called H&P's "foreign gentlemen investors" and announced that employees of "this American company" would now "become part of the payroll" of PDVSA.

6. These events culminated Defendants' unlawful treatment of "this American company" that had begun long before Minister/President Ramírez's inflammatory rhetoric on July 2, 2010. Beginning in late 2008 and 2009, despite the fact that H&P-V had fully performed all of its obligations under the relevant contracts, the PDVSA Defendants began systematically to breach those contracts. Although contractually obligated to pay at clearly established rates, the PDVSA Defendants - knowing that Venezuelan courts would not protect H&P's commercial rights - simply refused to pay as required under the contracts. The PDVSA Defendants' unexcused failure to pay for H&P's oil drilling services has resulted in over $32 million in unpaid invoices, and Defendants have expressed no intention of fulfilling their contractual obligations.

7. H&P cannot and will not receive just compensation for their seized business and property under Venezuelan law through the Venezuelan courts. Nor can they or will they receive justice in Venezuelan courts for Defendants' blatant breaches of contract. The Venezuelan courts are politically controlled by President Chávez and the executive branch of Defendant Venezuela, and for all practical purposes never rule against the Venezuelan government. According to the United States Department of State, the appellate court that would have jurisdiction over this case if it were tried and appealed in Venezuela has "ruled in favor of the government in 324 of the 325 cases brought by private citizens against the government." *See* U.S. Department of State, *2009 Human Rights Report: Venezuela* (Mar. 11, 2010). On information and belief, the sole case decided by that court in favor of a

private party against the government was later annulled by the Constitutional Chamber of the Supreme Tribunal of Justice, which invoked a special power that had never before been used in Venezuelan judicial history. President Chávez exercises complete control over judges and the judicial system. At President Chávez's direction, a simple majority of the National Assembly appoints and removes the highest court's judges, who, in turn, have the power to remove lower court judges without cause, and regularly do so for political reasons and to maintain control over judicial rulings. As a result, President Chávez demands and receives judges' loyalty. Upon information and belief, no U.S. company has ever prevailed in Venezuelan courts in a civil action for damages against the Chávez regime.

8. Where, as here, a foreign state engaged in the unlawful taking of a U.S.-owned business (along with related property) and in commercial activity in the United States would otherwise be able to rely on corrupt political control of its own judicial system to violate international and commercial rights with impunity, the FSIA establishes jurisdiction in the federal courts.

THE PARTIES

Plaintiffs

9. Plaintiff Helmerich & Payne International Drilling Co. ("H&P-IDC") is a domestic and international oil and gas drilling company. It is incorporated in Delaware and has its principal executive office at 1437 South Boulder Avenue, Tulsa, Oklahoma 74119. It is engaged in drilling of oil and gas wells for exploration and production companies all over the world. It has substantial

onshore and offshore drilling operations in the United States, as well as abroad, where it does business through branches or wholly owned subsidiaries in South America, Africa, and the Middle East. H&P-IDC is the wholly-owned subsidiary of Helmerich & Payne, Inc. ("H&P, Inc."), a public company whose shares are traded on the New York Stock Exchange. H&P, Inc. was incorporated in 1940 and is the successor to a business originally organized in 1920. It is one of the oldest and most experienced land oil and gas drilling companies in the world.

10. Plaintiff Helmerich & Payne de Venezuela, C.A. ("H&P-V"), a wholly owned subsidiary of H&P-IDC, is an oil and gas drilling company. It is incorporated in Venezuela, had its principal Venezuelan office in Anaco, Venezuela, and also used the offices of H&P-IDC at 1437 South Boulder Avenue, Tulsa, Oklahoma 74119. Due to its ownership by a U.S. company, H&P-V is expressly regarded and treated as a "foreign company" under Venezuelan law. H&P-V is a U.S. company for purposes of international law.

Defendants

11. Defendant Bolivarian Republic of Venezuela ("Venezuela") is a foreign state. It has been controlled by the regime of Venezuelan President Hugo Chávez since 1999.

12. Defendant Petróleos de Venezuela, S.A. ("PDVSA") is an agency or instrumentality of Venezuela. PDVSA is incorporated in Venezuela, with its principal executive office at Avenida Libertador, La Campiria Apartado 169, Caracas 1010-A, Bolivarian Republic of Venezuela. PDVSA is

a separate corporate entity from the Venezuelan government, but it is wholly owned and controlled by Defendant Venezuela and was legislatively created in 1975 as an instrument of Venezuela's national oil policy. The Venezuelan legislature created PDVSA by means of a statute entitled "Organic Law that Reserves the Industry and Commerce in Hydrocarbons to the State." PDVSA is governed by public law in Venezuela, and Venezuelan law requires that oil and gas activities be undertaken for the public welfare and in the social interest. PDVSA is required by law to follow the Ministry of Energy and Petroleum's guidelines, plans, and strategies, as well as the norms issued by the National Development Plans for the hydrocarbon sector. PDVSA is neither a citizen of a State of the United States, nor created under the laws of any third country. Thus, PDVSA is an agency or instrumentality of Venezuela under 28 U.S.C. § 1603(b).

13. Defendant PDVSA Petróleo, S.A. ("PDVSA-P") is an agency or instrumentality of Venezuela. PDVSA-P is incorporated in Venezuela, with its principal executive office at Avenida Libertador, Edificio Pdvsa Torre Oeste, Piso 8, La Campiña, Caracas 1060, Bolivarian Republic of Venezuela. PDVSA-P was created under a resolution of the Venezuelan Ministry of Energy and Mines, and is required to follow the polices, guidelines, and direction of the Venezuelan government, making its activities public in nature. PDVSA-P is governed by public law in Venezuela and Venezuelan law requires that oil and gas, *i.e.*, "hydrocarbon," activities be undertaken for the public welfare and in the social interest. PDVSA-P is the exploration and

operating arm of PDVSA, which, in turn, was created as an instrument of the Venezuelan state's oil policy. PDVSA-P is a wholly owned subsidiary of PDVSA. PDVSA-P is controlled by PDVSA and Venezuela. PDVSA-P is neither a citizen of a State of the United States, nor created under the laws of any third country. Thus, PDVSA-P is an agency, instrumentality, or organ of Venezuela under 28 U.S.C. § 1603(b).

JURISDICTION AND VENUE

14. This Court has subject matter and personal jurisdiction pursuant to 28 U.S.C. § 1330 and 28 U.S.C. § 1602 *et seq.*, including the expropriation exception to immunity under 28 U.S.C. § 1605(a)(3) and the commercial activity exception to immunity under 28 U.S.C. § 1605(a)(2).

15. Venue is proper in this District pursuant to 28 U.S.C. § 1391(d) (authorizing an action against an alien in any district) and 28 U.S.C. § 1391(f)(4) (authorizing civil actions against a foreign state or instrumentality in the District of Columbia).

FACTS COMMON TO ALL COUNTS

A. Plaintiffs' Oil Drilling Business in Venezuela

16. H&P-IDC or its predecessor has been operating in Venezuela through wholly owned subsidiaries — H&P-V and its predecessors — since 1954. H&P-V began performing oil and gas drilling operations for the PDVSA Defendants in the 1970s, and did so continuously until Defendants expropriated H&P-V's business in 2010. From the late 1990s until 2010, H&P-V performed contract

drilling services exclusively for the PDVSA Defendants and their affiliates.

17. H&P-V provided the full range of contractual oil drilling operations to Defendants. Once Defendants selected and prepared the drilling sites, H&P-V transported its drilling equipment to the sites, assembled the drilling rigs and related components, and commenced drilling.

18. The geological conditions and the location of the oil or gas reserves dictate the depth of a well and the type of drilling equipment required to reach the "pay zone" at a given drilling site. In Venezuela, the geological conditions often require deep wells because the "pay zone" can be 18,000 to 22,000 feet below the surface. In light of these conditions, the PDVSA Defendants have required a reliable drilling company with specialized equipment, capable of generating very high horsepower and reaching depths of roughly four miles underground. H&P is one of few such companies in the world, and even fewer operating or willing to operate in Venezuela.

19. President Chávez stated in the Expropriation Decree that "the depth of the wells to be drilled in the national territory . . . and the local geological structures require drilling equipment capable of generating [two to three thousand] horsepower, as well as high mechanical stress." Such equipment is rare and in high demand. As President Chávez recognized in the Expropriation Decree, "[t]he availability of [such] drilling equipment . . . is very low both in the country and at world level, and the lack thereof would affect [Venezuela's national oil drilling] Plan."

20. Defendant PDVSA issued a press statement, dated July 2, 2010, stating that H&P-V's drilling rigs "'are specialized drills we need for more complex sites deeper [sic] . . . The drills will be very useful' . . . According to the depth and geometry of the wells to be drilled . . . there are required teams [sic] of three thousand horsepower capacity, due to high mechanical stress occurring in the area." *See* PDVSA Press Release, An Act of Social Justice Represents Nationalization of Drills (July 2, 2010).

21. In order to meet these drilling requirements, H&P-V obtained from H&P-IDC some of the largest, most powerful, and deepest-drilling, land-based drilling rigs available. Specifically, each of the "big rigs" H&P-V utilized in Venezuela was capable of generating 2,000 to 3,000 horsepower, hoisting up to 1.6 million pounds, drilling to depths of 25,000 to 30,000 feet, and handling the difficult geological conditions in Venezuela. Big rigs are comprised of a complex array of components, generally including among other things, a 160-foot drilling mast or derrick, a large drilling substructure, five 1,200 horsepower engines, a silicon-controlled rectifier or "SCR," several large generators, a top drive, drawworks, hoisting apparatus, blowout preventer, rotating equipment, drillstrings, three 1,600 horsepower mud pumps, 2,000-barrel mud tanks, pipes, hoses, and other parts and equipment.

22. Once the drilling rigs and other components were assembled, H&P-V drilled in stages to pre-set depths thousands of feet below the surface; the final depths of H&P-V's wells were roughly four miles underground. Depending on the conditions, it typically took H&P-V between 6 and 12 months to drill a well.

23. In the final stage of H&P-V's drilling process, H&P-V completed the well so that oil would flow upward in a controlled fashion during an ensuing production phase. It was then possible for the PDVSA Defendants to install their production equipment, open the valves atop the well head, and extract the oil from the new well.

24. Upon completing a well, H&P-V typically disassembled its equipment, transported it to a new drill site designated by the PDVSA Defendants, and reassembled it to begin drilling a new well. It could take up to 30 days or more to move from one drilling site to another. The process of disassembling, transporting, and reassembling each big rig and its components was a very labor-intensive, time-consuming, and expensive process.

25. H&P-V also owned a substantial infrastructure needed to maintain, repair, operate, and transport the drilling equipment to the drilling sites selected by the PDVSA Defendants. This included real property—yards where vehicles could be parked and rigs could be maintained, repaired, upgraded, and stacked; office buildings for company administration; warehouses for spare parts and equipment; and housing and dining accommodations for drilling rig workers and other employees. It also included personal or movable property—more than 100 vehicles to transport employees, parts, and equipment; fire and safety equipment; drilling machinery; furniture and supplies; and a vast inventory of spare parts and other equipment.

26. Defendants have expropriated and now operate all eleven drilling rigs and all of the

supporting infrastructure; yet, they have not paid Plaintiffs for any of it.

27. Until the expropriation occurred, H&P had been among the few companies in the world with the drilling rigs, equipment, infrastructure, employees, and experience necessary to reliably and effectively provide drilling operations in Venezuela.

28. H&P had dutifully performed oil drilling operations for the PDVSA Defendants for years, but the PDVSA Defendants had become increasingly unreliable since President Chávez took office, especially after he quelled a 2002-03 strike at PDVSA, and replaced thousands of PDVSA employees with less experienced workers and executives who were vetted Chávez loyalists.

29. In the years that followed, the PDVSA Defendants took a new approach to the relationship with H&P. Knowing that the government-controlled courts would allow them to do so with impunity, the PDVSA Defendants refused to make timely payments in utter disregard of their contractual obligations. The new approach by the PDVSA Defendants ultimately led to the accumulation of tens of millions of U.S. Dollars in unpaid invoices, the unlawful blockades of H&P-V's yards, and the uncompensated, forcible taking of H&P's entire business in Venezuela.

B. The Drilling Contracts

30. H&P-V's oil drilling contracts and contract extensions covered multi-well, multi-year drilling projects for Defendants. Ten drilling contracts—each

relating to a different H&P-V rig[1]—are at issue in this action:

Contract No. 4600013176: Rig HP-160

Contract No. 4600016461: Rig HP-135

Contract No. 4600017135: Rig HP-113

Contract No. 4600017140: Rig HP-115

Contract No. 4600017141: Rig HP-127

Contract No. 4600017142: Rig HP-128

Contract No. 4600017143: Rig HP-129

Contract No. 4600017145: Rig HP-150

Contract No. 4600017146: Rig HP-153

Contract No. 4600017147: Rig HP-174.[2]

31. H&P negotiated the contracts with the regional division of the PDVSA Defendants located in the region where the respective drilling rigs were intended to operate. H&P negotiated one contract (Contract No: 4600016461) with the Western Division of the PDVSA Defendants and the other

---

[1] H&P had an eleventh rig operating in Venezuela during the relevant time period, which also was expropriated by Defendants. That rig—Rig H&P 116—was under contract to a different Venezuelan government-owned oil company, Boqueron, S.A. That contract is not within the scope of this Complaint.

[2] The contracts enumerated in paragraph 30 and their attachments and amendments are hereby incorporated by reference. Plaintiffs have not attached the contracts to the Complaint, to avoid inconvenience to the court and parties, because the originals are in Spanish and too voluminous when accompanied by English translations. Plaintiffs will submit the contracts and translations upon request or at an appropriate time.

nine contracts with the Eastern Division of the PDVSA Defendants.

32. PDVSA-P signed each drilling contract.

33. All ten contracts were for a "fixed term," meaning that they expired at the conclusion of an agreed-upon period unless the parties agreed to an extension or an extension occurred by the contract's original terms. For example, some of the contracts required completion of any well still in progress at the conclusion of the original contractual term, and extended the contract automatically through such well's completion.

34. The parties anticipated that all ten contracts would be extended beyond their original terms, as had occurred with prior contracts for many years prior to the confiscation of H&P's business; hence, the contracts contained renewal or extension provisions. The ten contracts at issue were originally signed in 2007 for initial periods ranging from five months to one year, but all ten contracts were subsequently extended for additional periods.

35. As is customary in the industry, all ten contracts provided for H&P-V's drilling operations to be performed on a "day-rate" contract basis. Pursuant to this arrangement, in exchange for providing drilling equipment and operations to the PDVSA Defendants, the PDVSA Defendants agreed to pay H&P-V a fixed rate per day that the drilling rig was in operation (the "day rate" or "daily rate").

36. Alternative daily rates were also agreed upon and set forth in each contract to cover periods during which H&P-V performed operations other than drilling, such as waiting for materials, repairing drilling rigs, transporting drilling rigs

between wells, and mobilizing or demobilizing the drilling rigs.

37. The agreed-upon daily rates for H&P-V, which are set forth at Exhibit E of each contract, were partially set forth in U.S. Dollars and partially in Venezuelan currency ("Bolivars" or "Bolivar Fuertes").[3] The value of the applicable daily rates varied from contract to contract, with fluctuations in exchange rates, and as the parties renegotiated the rates over time. Typically, the proportion of the applicable daily rates denominated in U.S. Dollars exceeded the proportion denominated in Bolivars.

38. H&P-V separately invoiced the amounts due in U.S. Dollars ("Dollar-based invoices") and the amounts due in Venezuelan currency ("Bolivar-based invoices")

39. H&P-V's single contract with the PDVSA Defendants in the western region (Contract No. 4600016461) expressly set forth that H&P-V's Dollar-based invoices would be paid by PDVSA-P in U.S. Dollars in the United States whenever the foreign exchange control measures in effect in Venezuela prevented H&P-V from exchanging local currency for U.S. Dollars, as necessary to meet certain U.S. Dollar obligations outside of Venezuela. Contract No. 4600016461, § 18.14 ("If as a result of the exchange control measures established by the competent authorities, [H&P-V] is unable to obtain

---

[3] The Bolivar was converted to a new currency—the "Bolivar Fuerte"—effective January 1, 2008, after the initial contracts at issue were signed. The Bolivar Fuerte was worth 1,000 Bolivars, such that overnight the exchange rate to U.S. Dollars went from 2,150:1 (Bolivars to Dollars) to 2.15:1 (Bolivar Fuertes to Dollars).

in a timely fashion the foreign currency required to perform its obligations abroad related to the performance of this CONTRACT, [PDVSA-P] agrees to pay in United States dollars the portion of the price of this CONTRACT set in said currency . . . ."). This condition was met throughout the relevant period. Thus, PDVSA-P was obligated to make payments to H&P in U.S. Dollars under Contract No. 4600016461.

40. The nine contracts with the PDVSA Defendants in the eastern region were supplemented by a written agreement applicable to each contract—between H&P-V and PDVSA on behalf of itself and PDVSA-P—under which the PDVSA Defendants PDVSA agreed to pay 61% of H&P-V's Dollar-based invoices in U.S. Dollars to H&P-V's designated bank account in Tulsa, Oklahoma, while retaining discretion to pay the remaining 39% of H&P-V's Dollar-based invoices in Bolivars to H&P-V's designated bank account in Caracas, Venezuela (the "61-39 agreement").

41. The 61-39 agreement is dated June 2, 2008, and signed by representatives of H&P-V and PDVSA. It provides: "The invoices issued corresponding to the contract's foreign currency component . shall be paid in actual U.S. dollars at 61%. This payment shall be made abroad in the account specified by the contractor. . . . The remaining portion, 39%, shall be paid in equivalent bolivars at the official exchange rate."

42. The contracts also contain provisions governing the payment of reimbursable expenses incurred by H&P-V. The contracts required the PDVSA Defendants to reimburse certain expenses,

without limitation, in the same currency in which those expenses were incurred by H&P-V.

43. Moreover, each of the ten contracts at issue expressly required, in Exhibit E, that payments made by the PDVSA Defendants in U.S. Dollars be sent directly to H&P-V's designated bank account at the Bank of Oklahoma in Tulsa, Oklahoma. Thus, under each of the contracts at issue, the PDVSA Defendants were required to make payments to H&P-V in U.S. Dollars directly to H&P-V's designated bank account at the Bank of Oklahoma in Tulsa, Oklahoma. Each of the contracts also required that payments made by the PDVSA Defendants in Bolivars be sent directly to H&P-V's bank account at the Mercantil Bank in Caracas, Venezuela.

44. Until the PDVSA Defendants stopped making payments entirely in 2010, they approved invoices issued by H&P-V requiring payment in U.S. Dollars to H&P-V's designated bank account in Tulsa, Oklahoma, pursuant to the 61-39 agreement, and paid many but not all of the invoices in the United States—albeit often late. Specifically, during the relevant time period, the PDVSA Defendants made at least 55 payments totaling roughly $65 million into H&P-V's designated bank account in Tulsa.

45. According to the agreed-upon invoicing process, H&P-V issued pro forma invoices, which the PDVSA Defendants were required to approve and return within a certain period, specifying any disputed line items. In some cases, H&P-V rejected the proposed changes and insisted upon payment; in others, H&P-V issued a new invoice that included

only the undisputed line items. Invoices were due to be paid within 30 calendar days of receipt by the PDVSA Defendants.

C. The PDVSA Defendants' Breaches of Contract

46. Starting in 2007, the PDVSA Defendants fell substantially behind in their payments to H&P-V. By August 2008, H&P-V's receivables balance under the contracts at issue had reached $63 million.

47 In an attempt to address the overdue receivables and protect H&P-V's liquidity, H&P repeatedly sought and held meetings with the PDVSA Defendants to address the outstanding invoices.

48. These meetings occurred frequently, sometimes as often as one or more times per month. At these meetings, the PDVSA Defendants never denied that they owed the amounts set forth by H&P. To the contrary, the PDVSA Defendants acknowledged their debt and provided assurances that payment on the outstanding invoices—which the PDVSA Defendants had in many cases already pre-approved—was forthcoming.

49. Notwithstanding the PDVSA Defendants' repeated assurances, H&P-V's overdue receivables balance under the contracts at issue continued to climb throughout 2008. By January 2009, it was approaching $100 million.

50. In its earnings release dated January 29, 2009, H&P, Inc. announced that it would "cease[] operations on rigs as their drilling contracts expire" and not renew its subsidiary's contracts with the PDVSA Defendants absent an "improvement in

receivable collections." H&P took this step to avoid continuing to perform work and incur expenses without compensation.

51. For their part, the PDVSA Defendants continued to fail to make payments to H&P-V as invoices became due. As a result, H&P-V's receivables under the contracts at issue continued to climb, exceeding $113 million by June 2009.

52. Despite the PDVSA Defendants' failure to perform in good faith and pay outstanding receivables, H&P-V finished its drilling obligations. Upon completion of its drilling obligations, and as the contracts were expiring, H&P began winding down its operations in the first half of 2009. Throughout this period, H&P continued to negotiate in good faith to achieve: (1) payment of the PDVSA Defendants' outstanding debt to H&P and (2) resumption of drilling operations to make use of the idled rigs. H&P made clear to the PDVSA Defendants that it would not enter into new contracts or restart drilling operations unless the PDVSA Defendants paid a substantial amount of their outstanding debt—including the U.S. Dollar component payable in the United States.

53. By November 2009, H&P-V had fulfilled each and every contractual obligation it had under each of the drilling contracts. Upon completion of each contract, H&P-V disassembled the drilling rig and components, transported it, and stacked it in H&P-V's yards, pending substantial payment by the PDVSA Defendants.

54. In early 2010, Venezuela devalued its currency by a 2-to-1 ratio. Because a portion of H&P-V's accounts receivable from the PDVSA

Defendants were denominated in Bolivar Fuertes, this devaluation drastically reduced the value of that portion of H&P-V's accounts receivable.

55. Discussions between H&P and the PDVSA Defendants culminated in a meeting held on May 24, 2010 at the headquarters of PDVSA's subsidiary, CITGO Petroleum Corporation, in Houston, Texas. The parties failed to resolve their differences. Once again, the PDVSA Defendants did not contest the amount past due to H&P-V. Nonetheless, they rejected H&P's proposed payment plan and failed to offer a payment plan of their own. H&P declined to enter into any new contracts until it received a substantial payment for unpaid invoices in connection with the drilling operations performed under the old contracts.

56. The PDVSA Defendants have not remitted any payments to H&P-V in the United States since March 2010, and they have not remitted any payments to HP-V in Venezuela since May 2010. The total amount of their outstanding debt to H&P-V, under the contracts at issue, is currently at least $32 million. This amount includes invoices that the PDVSA Defendants pre-approved for payment in U.S. Dollars to H&P-V's designated account in Tulsa, Oklahoma.

57. H&P-V has fully performed under each of the contracts at issue.

58. The PDVSA Defendants are in breach of each of the contracts with H&P-V

D. Defendants' Expropriation of H&P's Business in Venezuela

59. On or about June 12, 2010 — more than two weeks prior to the National Assembly's "Bill of Agreement" and President Chávez's decree— employees of the PDVSA Defendants surrounded and unlawfully blockaded the business premises of H&P-V's drilling operations in Ciudad Ojeda, in the western region of Venezuela.

60. On or about June 13 and 14, 2010, armed and uniformed soldiers of the Venezuelan National Guard and employees of the PDVSA Defendants surrounded and unlawfully blockaded the business premises of H&P-V's drilling operations in Anaco, in the eastern region of Venezuela, which was H&P-V's headquarters in Venezuela.

61. On information and belief, the Venezuelan National Guard and the employees of the PDVSA Defendants were sent without legal authority at the direction of Defendant Venezuela, acting through President Chávez or his ministers - for the unlawful purposes of blockading and seizing H&P-V's assets, preventing any assets from being taken out of H&P-V's yards, and intimidating H&P-V into entering into new drilling contracts and forgiving the debt of the PDVSA Defendants.

62. H&P personnel were permitted to enter and exit, but were not permitted to remove any of H&P's property from the yard. Armed soldiers from the Venezuelan National Guard searched H&P vehicles and personnel as they exited the yard.

63. PDVSA's Director of Services expressly informed H&P-V's Administrative Manager that Defendants intended the blockade to prevent H&P-V

from removing its rigs and other assets from its premises, and to force H&P-V to negotiate new contract terms immediately. Among the demands the PDVSA Defendants asserted at this time was a demand that H&P-V forgive the outstanding debt by retroactively renegotiating the contracts' price terms.

64. On June 17, 2010, citing the stress on H&P personnel, H&P's Administrative Manager asked PDVSA officials to end the blockade, reduce the number of people involved, and/or cease the restrictions. No change occurred.

65. On June 23, 2010—nearly a week prior to the National Assembly's "Bill of Agreement" and President Chávez's Expropriation Decree—PDVSA issued a press release stating that "[t]he Bolivarian Government, through Petroleos de Venezuela SA (PDVSA) nationalized 11 drilling rigs" belonging to "the company Helmerich & Payne (HP), a U.S. transnational firm." PDVSA Press Release, Venezuela Will Assume Sovereign Control of 11 Drilling Rigs (June 23, 2010).

66. Two days later, on June 25, 2010—still prior to the "Bill" and the decree—PDVSA issued a press release titled, "Our workers have in custody the drilling rigs." That release states in part:

> The Bolivarian Government, through Petróleos de Venezuela (PDVSA), continues on his [sic] sovereign action to recover 11 drilling rigs from the company Helmerich & Payne (H&P) . .
>
> "The workers are guarding the drills," said the People's Minister for Energy and Petroleum and President of PDVSA, Rafael Ramírez . . .

> The nationalization of the oil production drilling rigs from the American contractor H&P not only will result in an increase of oil and gas production in the country, but also in the release [sic] of more than 600 workers and the increase of new sources of direct and indirect employment in the hydrocarbon sector.

PDVSA Press Release, Our Workers Have in Custody The Drilling Rigs (June 25, 2010).

67 On June 29, 2010—more than two weeks after Defendants began their ongoing illegal blockades and effectively seized H&P's ongoing Venezuelan business—Defendant Venezuela, acting through the Venezuelan National Assembly, declared that the taking of all eleven of H&P's oil drilling rigs and associated property would be of "public benefit and good," and recommended to the "National Executive" that it issue a "Decree of Expropriation."

68. Later that same day, on June 29, 2010, Defendant Venezuela, acting through President Chávez, issued the Expropriation Decree, presidential decree number 7532. President Chávez's decree authorized the "forcible taking" of H&P's assets, including all eleven drilling rigs, and "all the personal and real property and other improvements made by [H&P]." It declared that "[t]he expropriated property will become the unencumbered and unlimited property of PDVSA, S.A., or its designee affiliate, as expropriating entity," and it directed Defendant PDVSA to "commence and carry out the expropriation procedure."

69. According to the decree, the purpose of the taking was to "safeguard commercial policies," "defend the economic activities of national public and private companies," and enable "PDVSA, its affiliates, and [related] mixed companies" to meet their "production plans and targets." In short, it was intended to advance the commercial interests of the Defendants.

70. The decree asserted that the drilling rigs were "vital" to Defendants because "the depth of the wells to be drilled in the national territory and the local geological structures require drilling equipment capable of generating [two to three thousand] horsepower, as well as high mechanical stress" and "[t]he availability of [such] drilling equipment . . is very low both in [Venezuela] and at world level."

71. That same day, on June 29, 2010, the PDVSA Defendants announced that a notary public would conduct a judicial inspection of the rigs and other assets at the Anaco yard (but apparently not the yard in Ciudad Ojeda). Given the uncertainty as to whether H&P would ever again have access to its property, H&P-V hired a notary to accompany the PDVSA Defendants' notary; H&P-V's notary simultaneously performed a rushed and incomplete inspection in the limited time available that day

72. On July 1, 2010, PDVSA-P filed, in the Venezuelan civil judicial court of El Tigre, an eminent domain proceeding relating to the ten drilling rigs and related real and personal property confiscated in Anaco, in the east. More than a year has passed since PDVSA-P's filing of that case, but the initial "notice" or "edict" in that case still has not

been published; as a result, the process has been stalled for more than a year and H&P-V still has not been afforded the opportunity to appear.

73. On July 1, 2010, PDVSA-P also filed, in the Venezuelan civil judicial court of Cabimas, an eminent domain proceeding relating to the one drilling rig and related real and personal property confiscated in Ciudad Ojeda, in the west. In that case, eight months passed before the initial "notice" or "edict" was published on March 1, 2011; although H&P-V subsequently appeared and was made a party, those proceedings have not progressed past the earliest stage of the case.

74. The next day, on July 2, 2010, Minister/President Ramírez announced the purportedly official seizure of the drilling rigs and all other real and personal property held by H&P-V

75. The seizure constituted a taking of the entirety of H&P's Venezuelan business operations, including all of its personal and real property, oil drilling rigs and equipment, vehicles, office equipment and other physical assets.

76. On information and belief, from the time of that seizure, the PDVSA Defendants have been operating H&P-V's Venezuelan business as a going concern—employing not only the real and personal property but also H&P's drilling rig managers, drilling rig workers, and other professionals who were trained by, and formerly worked for, H&P-V

77. As documented by the notary on June 30, 2010, the expropriated assets from the Anaco yard in the east include, among other things, ten drilling rigs and related components, derricks, storage tanks, funnels, pumps, blowout preventer valves, cables,

pipes, and tools. These drilling rigs and related parts were all in a good, operational state when they were confiscated.

78. The expropriated assets from the Ciudad Ojeda yard in the west include, among other things, one drilling rig and the related components, parts, and equipment. That drilling rig and its related parts were also in a good, operational state when they were confiscated.

79. A substantial amount of other equipment, property, and infrastructure was also taken from H&P-V For example, there were, among other things, dozens of trucks, vehicles, forklifts, ambulances, firefighting equipment, fans, motors, hoses, valves, tires, storage tanks, pumps, generators, and other parts and equipment. After the taking, on information and belief, Defendants simply repainted H&P-V's cars, trucks, and other equipment with their own PDVSA colors and logos.

80. The scope of the taking also included substantial real property in Anaco, including various trailers used as offices, cooking and dining facilities, and bedrooms; eight houses and one clubhouse; warehouses for spare parts and equipment; and four office buildings—two for administrative functions, one for human resources, and one for medical services. There were confidential files in the office buildings, but even many of those were taken by Defendants.

81. Stripped of all of its productive assets, H&P-V ceased to operate and no longer exists as a going concern. Defendants took the entire business, which they now operate as a state-owned commercial enterprise.

82. Defendants themselves have publicly stated that they intentionally took "the company" when they took its assets. For example, during his speech on July 2, 2010, Minister/President Ramírez proclaimed that "the Venezuelan Government, through its appropriate authorities, is taking over this drill company which has been nationalized by the revolution."

83. A PDVSA press release, dated July 2, 2010, states that "Minister Ramírez explained that this action will guarantee that the drills will be operated by PDVSA as a company of all Venezuelans, it also ensures the rights of former employees of H&P, who . . . now . . . will become part of PDVSA."

84. Defendants' rhetoric and conduct demonstrates that the business was taken by Defendants for the purpose of turning it into a state-owned and state-operated enterprise. On information and belief, Defendants currently employ H&P-V's assets and former employees to provide drilling and other services that H&P-V once provided in Venezuela. In short, Defendants now operate the assets and the going concern they took from H&P.

85. H&P no longer possesses any significant tangible property or maintains any commercial operations in Venezuela. Having suffered the expropriation of an entire company without compensation, H&P has suffered a loss that is cognizable under international law in a U.S. court.

E. Defendants' Failure To Compensate Plaintiffs For The Expropriation

86. Defendants have failed to provide any compensation, much less just compensation under international law. For compensation to be "just"

under international law, it must be "prompt, adequate, and effective."

87. Although more than a year has passed since PDVSA-P filed two eminent domain actions relating to the confiscation of H&P-V's assets in the east and west regions, no meaningful progress has been made. In the El Tigre proceedings in the East, H&P-V still has not been served or made a party to the case. In the Cabimas proceedings in the West, H&P-V still is in the initial stage of the case, which has stalled indefinitely. On information and belief, the Defendants and their courts control the pace of these proceedings, and have little or no incentive to move the process along.

88. Even if these cases were allowed to proceed, H&P would never receive due process, much less a fair judgment on the prompt, adequate, and effective compensation to which they are entitled under international law.

89. In a recent sworn declaration submitted in another U.S. litigation, a Venezuelan legal scholar provided his expert opinion regarding the decisions of Venezuela's Political-Administrative Chamber of the Supreme Tribunal of Justice, the highest court responsible for deciding appeals of cases brought by private parties against the government for "damages and other compensation." He studied the decisions of the Political-Administrative Chamber during the 2007-08 time period and found the following:

- The Chamber decided 89 contract cases brought by private parties against the Venezuelan government - and the Venezuelan government prevailed in all 89 cases.

- The Chamber decided 5 contract cases brought by the Venezuelan government against private parties—and the Venezuelan government prevailed in all 5.
- The Chamber decided 366 petitions by private parties to nullify an administrative act of the Venezuelan government and/or seek damages—and the Venezuelan government prevailed in 365 out of 366 cases. The only case to be decided for a private party "was later annulled by the Constitutional Chamber of the Supreme Tribunal of Justice, by using a special power that had never been used in Venezuelan judicial history."

Based on these and other data, the legal scholar stated: "[T]he conclusion seems obvious: the Venezuelan contentious-administrative courts are not willing to rule against the State in any case." *See* Decl. of Antonio Conova González at 10, *Northrop Grumman v. Ministry of Defense*, ECF No. 160-3, Case 1:02-cv-00785-WJG-JMR, Dkt. (S.D. Miss. filed Dec. 7, 2009). Similar conclusions are echoed by a broad spectrum of authorities. According to the U.S. Trade Representative, although the Venezuelan government has nationalized "[s]eventy-six companies, including several U.S.-owned firms," pursuant to a May 2009 law relating to hydrocarbons, "none have received compensation to date." U.S. Trade Representative, 2011 National Trade Estimate Report on Foreign Trade Barriers (Mar. 2010); *see also* Bureau of Economic, Energy and Business Affairs, U.S. Department of State, *2011 Investment Climate Statement: Venezuela* (March 2011) (stating that it "do[es] not believe that any

compensation has been paid to date" to these nationalized companies).

90. According to the U.S. Department of Commerce, Defendant Venezuela "maintains that it will compensate for nationalizations," when, in reality, it has "seldom paid" any compensation to companies whose assets have been seized in recent years. *See* U.S. Department of Commerce, *Doing Business in Venezuela: 2011 Country Commercial Guide for U.S. Companies*, at Ch. 6.

91. The U.S. Department of State reports that "of the companies with U.S. ownership whose assets have been seized over the past couple of years, President Chávez has offered compensation but has seldom paid, often forcing companies to seek settlement through international arbitration." Bureau of Economic, Energy and Business Affairs, U.S. Department of State, *2011 Investment Climate Statement: Venezuela* (March 2011).

92. According to Venezuela's Association of Urban Property Owners ("APIUR"), the Venezuelan government has paid compensation to only 5% of the 280 "urban property owners" whose property it nationalized between 2008 and 2011. Ultima Hora, *95% de Inmuebles Expropiados No Han Sido Pagados* (Jan. 10, 2011).

93. The World Economic Forum, which ranks Venezuela the *worst country in the world* in terms of property rights, judicial independence, and the efficiency of the legal framework for challenging government action, has recognized the "scarce propensity of the [Venezuelan] government to pay reasonable compensation in the case of expropriation." *See* World Economic Forum, *The*

Global Competitiveness Report, 2011-2012; *World Economic Forum Report: Benchmarking National Attractiveness for Private Investment in Latin American Infrastructure* (2007).

94. The Heritage Foundation, in its most recent Index of Economic Freedom report, similarly found that "[l]and and other private holdings are expropriated by the [Venezuelan] government arbitrarily and without *compensation*." Heritage Foundation, *2011 Index of Economic Freedom Venezuela* (emphasis added); *see also* The Economist: *Expropriations in Venezuela: Full Speed Ahead* (Oct. 29, 2010) (noting that although, [l]egally, before a company can be nationalised, the legislature must declare the expropriation 'in the public interest,' and the target is entitled to present a defence and receive fair and prompt compensation," but that *"[n]one of this happens in practice."* (emphasis added)).

95. In short, Venezuela does not pay prompt, adequate, or effective compensation to those whose property it confiscates. Moreover, due to the absence of judicial independence in Venezuela, most plaintiffs—especially American companies—in practice have no legal recourse through the courts of Venezuela. As set forth below, Venezuelan courts are politically dominated by the Executive and do not provide impartial justice in any case in which the government has an interest, including expropriation cases. As Defendants are well aware, Plaintiffs will never receive prompt, adequate, and effective compensation in Venezuelan proceedings.

96. Moreover, compensation in any amount awarded by a Venezuelan court would be inherently inadequate because it would not actually be paid by

the Venezuelan political branches; and, even if it were paid, it would be in a non-convertible currency, which is inadequate under international law.

F. Defendants' Discriminatory Conduct

97. H&P's property was targeted and confiscated in part because of H&P's U.S. ownership and identity.

98. In seizing H&P-V's assets, Minister/President Ramírez condemned "this American company" and its "foreign gentlemen investors."

99. Under Venezuelan law, various restrictions are placed on foreign investors, including limits on the types of industries in which they can invest.

100. Venezuelan law also requires foreign investors to register their investments in Venezuela with the Superintendent of Foreign Investment (*i.e.*, the "Superintendencia de Inverseiones Extranjeras" or "SIEX"), which is part of the Venezuelan Finance Ministry. Venezuelan law defines "foreign investment" broadly to include, among other things, "[c]ontributions from abroad, coming from foreign persons or companies, destined to the capital of a company, in freely convertible currency or in physical and tangible assets such as: industrial plants, new or refurbished machinery, spare parts, raw material and intermediate products."

101. As part of the registration process, foreign investors must file with SIEX a Foreign Investment Application Form ("Solicitud de Registro o Actualizacion de Inversion Extranjera"). Similarly, the company receiving the "foreign investment" must file with SIEX a Company Qualification Application

form ("Solicitud o Actualización de Constancia De Calificacion De Empresa"). H&P-IDC and H&P-V regularly complied with these requirements.

102. Based on the rules governing foreign investment—and the fact that H&P-V is 100% U.S.-owned—the Defendants have deemed H&P-V to be a "foreign" company for purposes of Venezuelan law. The Company Qualification Certificate that SIEX issued to H&P-V states that "100% of the capital of [H&P-V] is property of [H&P-Int'l]." It also states that all of H&P-V's board members are "U.S. citizen(s)" and identifies them by name. Finally it states that "[H&P-V] is accordingly considered a FOREIGN COMPANY at all relevant legal effects."

103. H&P-V thus was and is deemed to be a "foreign company" for all legal purposes, because 100% of its capital came from foreign investment received from its U.S. parent corporation, H&P-IDC.

104. As a result of their character as U.S. entities, H&P-IDC and H&P-V have been subjected to discriminatory treatment by Defendants.

105. On the day that the Venezuelan National Assembly declared H&P-V's oil drilling rigs to be public property belonging to the state, Jesus Graterol, a Deputy in the Venezuelan National Assembly and President of the National Assembly's Committee on Energy and Mines, criticized opponents of the nationalization as acting "in accordance with the instructions of the [U.S.] Department of State" on behalf of H&P, and trying to "subsidize the big business transnational corporations, so that they can promote what they know best to do, which is war, . . . through the large military industry, of the Empire and its allies." *See*

Translation of Interview on Venezuelan VTV Television Network, June 29, 2010, *available at* http://www.youtube.com/watch?v=_jbI5514HRw.

106. A Venezuelan state reporter publicly summarized the debate in this way: "We remind you that at this time the debate continues to issue the declaration of public interest of these eleven American rigs, which, should this motion be approved, would then become part of the energy machinery of Socialist Petróleos de Venezuela." *See* Translation of Interview on Venezuelan VTV Television Network, June 29, 2010, *available at* http://www.youtube.com/watch?v=_fjbI5514HRw.

107. A PDVSA press release condemned H&P, calling it a "U.S. transnational firm." *See* PDVSA Press Release, Recovered Drilling Rig Will Begin Operations in Monagas (July 16, 2010).

108. Another PDVSA press release discusses the "nationalization of the oil production drilling rigs from the USA company contractor H&P" and "emphatically rejects statements made by spokesmen of the American empire-traced [sic] in our country by means of the oligarchy." *See* PDVSA Press Release, Petróleos de Venezuela Informs the Venezuelan People (June 25, 2010).

109. Yet another PDVSA press release announces that "Minister Ramírez explained that this action will guarantee that the drills will be operated by PDVSA as a company of all Venezuelans, it also ensures the rights of former employees of H&P, who a year ago were exploited and then dismissed by this American company, but now they will become part of PDVSA." *See* PDVSA Press Release, An Act of Social

Justice Represents Nationalization of Drills (July 2, 2010).

110. President Chávez and the Venezuelan government have expressed their overriding hostility toward the United States. As reported by the U.S. Department of Commerce, "[t]he political relationship between Venezuela and the U.S. is characterized by harsh anti-U.S. rhetoric by President Hugo Chávez." *See* U.S. Department of Commerce, *Doing Business in Venezuela: 2011 Country Commercial Guide for U.S. Companies*. As reported by the U.S. Department of State:

> U.S.-Venezuelan relations have been tense in recent years . . . . President Chávez continues to define himself in opposition to the United States, using incendiary rhetoric to insult the U.S. Government and U.S. influence in Latin America. President Chávez ordered the expulsion of the U.S. Ambassador on September 11, 2008 . .

See Background Note: Venezuela (Feb. 8, 2011), available at: *http://www.state.gov/r/pa/ei/bgn/35766.htm*.

111. In September 2008, President Chávez ordered the expulsion of the U.S. ambassador, accused the United States of trying to start a coup and declared that the United States should "[g]o to hell a hundred times." The Guardian, Venezuela: Hugo Chávez Expels U.S. Ambassador Amid Claims of Coup Plot (Sept. 12, 2008). In September 2009, Chávez gave a speech in which he declared that the United States is "the greatest terrorist in world history," adding that the "Yankee empire will fall. It's already falling, and will disappear from the face

of the Earth, and it's going to happen this century." Russia Today, Hugo Chávez Kicks Off Russian Visit with Emotional Speech at Moscow University (Sept. 10, 2009).

112. Venezuela's anti-U.S. rhetoric and conduct extends to U.S. companies. The U.S. Department of Commerce reports the rising incidence of "anti-U.S. company bias in government procurements" and "active discrimination against American products by government agencies and government-owned companies." *See* U.S. Department of Commerce, *Doing Business in Venezuela: 2011 Country Commercial Guide for U.S. Companies* (March 2011). The U.S. Department of Commerce also warns U.S. exporters and investors in Venezuela to proceed cautiously in light of current conditions, including "anti-market orientation, and virulent anti-U.S. rhetoric" in Venezuela. *Id.*

113. "[V]irulent anti-U.S. rhetoric," has been directed at specific U.S. companies in addition to H&P. For example, when ExxonMobil suffered a legal setback in a case against Venezuela, President Chávez declared it a "victory over the empire that fills us with national pride." *See* PDVSA Press Release, Hugo Chávez: A Victory Over The Empire That Fills Us With National Pride (March 25, 2008). When the U.S. Department of State issued a statement in support of that U.S. company, Minister/President Ramírez described it as "an act of economic warfare" and accused this "transnational elite company" of "maneuver[ing]" on behalf of the U.S. Government. *See* PDVSA Press Release, Behind ExxonMobil's Maneuvers is the United States Government" (Feb. 13, 2008).

114. Antipathy to the United States and American companies pervades other aspects of President Chávez's government, including its foreign policy. For example, Chávez has developed closer relationships with those countries that pose the biggest security threats to the United States, including Iran and Syria, two U.S.-designated state sponsors of terrorism. The U.S. Department of State reports that "President Chávez has deepened relations with Iran . . . by signing multiple economic and social accords and publicly supporting Iran's controversial nuclear program." *See* Background Note: Venezuela (Feb. 8, 2011), available at: *http://www.state.gov/r/pa/ei/bgn/35766.htm*. He refers to Iran as a close "strategic ally," condemns U.N. Security Council Resolutions that impose sanctions on that country, and recently asserted that the Venezuelan Government "will back Iran under any circumstances and without conditions." *Id.* President Chávez has also formed closer ties with North Korea and Syria. *Id.*

G. Direct Effects in the United States

115. The PDVSA Defendants' breaches of contract—and refusal to make contractually obligated payments—have had direct and immediate effects in the United States, including payments that the PDVSA Defendants were obligated to make in the United States but failed to make, H&P-V's inability to declare and remit dividends to its U.S. parent corporation, and a profound alteration of H&P-IDC's management and support of H&P-V

116. *Obligations to make payment in the United States.* The contracts, parties' course of conduct, and contemporaneous documents reflect the obligations

of the PDVSA Defendants to make payments in U.S. Dollars into a designated bank account in Tulsa, Oklahoma. When the PDVSA Defendants breached their contractual obligations, the failure to make required payments into the previously designated Tulsa, Oklahoma bank account had a direct effect in the United States.

117. Consistent with their obligations under the contracts, pertinent amendments, and agreements, the PDVSA Defendants made numerous payments into the Tulsa, Oklahoma bank account. When the PDVSA Defendants breached their contractual obligations, payments that were to have been made to the bank account in Tulsa, Oklahoma were not made, having a direct effect in the United States.

118. The PDVSA Defendants' agreement to pay a portion of the contracts in U.S. Dollars into a designated U.S. bank account is reflected not only in the drilling contracts but also in meeting minutes, dated June 2, 2008, that memorialize that agreement and are signed by both PDVSA and H&P-V. This 2008 agreement reiterated the terms of an earlier 2003 agreement, which similarly provided for a set percentage of the PDVSA Defendants' payments to be remitted in U.S. Dollars to a bank account in the United States.

119. The parties' invoicing practice also reflected the payment of U.S. Dollars in the United States. The process of payment began with H&P-V's issuance of a pro forma. Where required in light of the services specifically invoiced, the pro forma invoices issued by H&P-V reflected a demand for payment in U.S. Dollars, which were to be remitted to the United States under the contracts. The

PDVSA Defendants then reviewed and approved these pro forma invoices, at which point H&P-V issued an invoice. Numerous pro formas and final invoices confirm that the PDVSA Defendants accepted and—for a time—complied with its obligations to remit payments to the United States under each of the contracts at issue.

120. The PDVSA Defendants also instituted a mechanism to verify that, from their perspective, the payments made in U.S. Dollars, paid in the United States, did not exceed the contractually required levels. These so-called "dollar audits" were conducted by the PDVSA Defendants into 2009. The PDVSA Defendants' failure to make the required U.S. Dollar payments into the designated bank account in the United States had a direct effect in the United States.

121. *Dividends.* H&P-V was part of an integrated corporate structure, wholly owned by H&P-IDC—a U.S. corporation—which is, in turn, wholly owned by H&P, Inc.—a U.S. corporation listed on the New York Stock Exchange. Throughout the contractual relationship with the PDVSA Defendants, H&P-V remitted or attempted to remit dividends to H&P-IDC, its U.S.-owned, U.S. parent corporation in the United States.

122. H&P-V was expected to declare and remit dividends to H&P-IDC in the United States, and had an established practice of doing so, including in 2005 and in 2007. As recently as 2008, H&P-V declared a dividend to be remitted to H&P-IDC, its parent company in the United States, and sought to have that dividend paid in U.S. Dollars in the United States pursuant to the expectation of its U.S. parent

company. The PDVSA Defendants' breaches of the contracts meant that dividends to be declared and remitted in the United States were not declared and/or remitted, and thus, had a direct effect on H&P-IDC, the U.S. parent corporation in the United States.

123. *Third Party Contracts.* H&P-V depended on the influx of materials, services, and personnel from the United States in order to perform its contract oil and gas drilling operations for the PDVSA Defendants in Venezuela.

124. H&P-V routinely entered into third-party agreements with vendors, suppliers, and services companies in the United States, for the purpose of delivering goods and services from the United States to Venezuela to permit H&P-V to perform its contracts with the PDVSA Defendants.

125. Payments for these third-party contracts often had to be made by H&P-V in U.S. Dollars in the United States.

126. The PDVSA Defendants' failure to honor their contractual payment obligations to H&P-V directly impacted H&P-V's ability to make these payments, as well as the relationships and obligations that H&P-V had with third-party vendors and service providers in the United States. Because H&P-V was left without funds to pay the third parties in the United States in U.S. Dollars, H&P-IDC advanced the money in the form of corporate debt, issued payments, and maintained accounts and records to reflect H&P-V's liabilities to H&P-IDC.

127. When, as a result of the PDVSA Defendants' breaches of contract, H&P IDC was compelled to pay third party vendors on H&P-V's behalf, H&P-IDC

suffered direct out-of-pocket losses in the United States.

128. There were direct effects in the United States when the PDVSA Defendants refused to pay H&P-V as agreed and, as a result of that refusal to pay, H&P-V was unable to meet its payment obligations to third parties in the United States, and H&P-IDC was compelled to loan money to H&P-V and make payments to third parties on H&P-V's behalf.

129. *Direct Effects on H&P-IDC in the United States.* Plaintiff H&P-IDC, as parent corporation to H&P-V, provided significant managerial, technical, and other support throughout H&P-V's operations in Venezuela, and expected H&P-V to remit dividends in return. H&P-IDC acquired, sold, and shipped from the United States parts and equipment for the maintenance, repair, and servicing of the drilling rigs and related machinery in Venezuela.

130. H&P-IDC provided management guidance and oversight, as well as logistical support from the United States.

131. H&P-IDC provided or facilitated legal, accounting, compliance, human resources, information technology, internal auditing, purchasing, health and safety, and other back-office support from the United States. Some of H&P-V's officers and senior managers were on the U.S. Dollar, U.S.-based payroll of H&P-IDC.

132. H&P-IDC reviewed and approved strategic and important management and operational decisions taken by H&P-V. These decisions included, for example, whether to make or liquidate capital investments, whether and when to move rigs and

other assets from one region to another or into or out of Venezuela, and whether and when to enter into new contracts or extend existing contracts.

133. When the PDVSA Defendants breached their contractual obligations, H&P-V was compelled to idle its rigs in Venezuela. H&P-IDC and third parties, in turn, stopped selling and shipping parts and equipment for the maintenance, repair, operation, and servicing of the drilling rigs, directly affecting the operations and bottom line of H&P-IDC and third parties in the United States.

134. Due to the breaches of contract, H&P-V stopped purchasing the parts, equipment, and services that it normally purchased in the United States in order to maintain, repair, operate, and service the drilling rigs and related equipment in connection with regular drilling operations. The cessation of demand for parts, services, and equipment directly and immediately affected H&P-V's and the third parties' commercial transactions in the United States.

135. When the PDVSA Defendants breached their contractual obligations, H&P-IDC subsidized or loaned money to H&P-V by paying for certain expenses and overhead costs of that entity, thereby reversing the flow of funds (which should have flowed from H&P-V to H&P-IDC), with direct effect on the books and bottom line of the U.S. parent corporations.

136. *Effect on U.S. Business Operations.* When the PDVSA Defendants breached their contractual obligations, H&P was compelled to actively pursue payment from the PDVSA Defendants, including by writing demand letters, developing and proposing

payment plans, and considering settlement possibilities. Those activities were carried out in the United States, at the headquarters of the U.S. parent corporation, and elsewhere in the United States.

137. H&P was compelled to negotiate with the PDVSA Defendants on the telephone from the United States, and in a face-to-face meeting in Houston, Texas. H&P also had to send personnel from the United States to Venezuela to provide accounting and other support in the process of responding to PDVSA's failure to make its contractually obligated payments.

138. *Effects of the Expropriation.* The expropriation of H&P-V's business operations had direct effects on H&P-IDC by causing it to incur substantial costs.

139. Venezuela's expropriation of the rigs deprived H&P-IDC of its ownership and control of H&P-V, and deprived H&P-IDC of its subsidiary and its business as a going concern, directly impacting the operations and bottom line of H&P-IDC.

140. Venezuela's expropriation of the rigs directly impacted U.S.-based management and activities in support of H&P-V, shifting from management and support of a going concern to a collection and negotiation effort.

141. H&P, Inc. was compelled to accept and publicly disclose in the United States material losses.

142. H&P had to change strategy and shift deployment of U.S. personnel to operations in different countries or regions, as a systemic, direct result of Defendants failure to pay tens of millions of U.S. Dollars under the contracts.

143. The expropriation also directly affected third party vendors of H&P-V in the United States who no longer had a role supporting its Venezuelan operations.

H. Defendants' Commercial Activities in the United States

144. The PDVSA Defendants are engaged in significant commercial activity in the United States, defined by the FSIA as "a regular course of commercial conduct or a particular transaction or act." 28 U.SC. § 1605(a)(3). For example, the PDVSA Defendants have entered into long-term contracts with U.S. partners, and engaged in commercial activity specific to the instant case.

145. The United States is currently Venezuela's most important trading partner, with bilateral trade topping 37.4 billion U.S. Dollars in 2009. That same year, Venezuela and PDVSA shipped an average of 1.1 million barrels of crude oil and petroleum products per day to the United States.

146. In addition, Venezuela has imported from the United States billions of U.S. Dollars worth of oil and gas machinery such as drilling rigs, derricks, pumps, and valves, for use by the PDVSA Defendants and other entities.

147. United States companies publicly identify PDVSA as a contractual partner and apparently a customer in the United States. For example, U.S.-based PGI Energy, Inc and BGI Contractors LLC, which formed a joint venture focusing on the fabrication of drilling rigs for its existing contract orders, count PDVSA as a current customer. Similarly, American Piping Products, which is

headquartered in Missouri, recently completed a pipe supply contract with PDVSA.

148. PDVSA's public financial reporting reflects extensive sales the company and its subsidiaries make to customers in the United States. During the nine-month period ending September 30, 2010, PDVSA and its subsidiaries made sales to customers in the United States in excess of 23 billion U.S. Dollars, an increase of more than four billion U.S. Dollars as compared to the same time frame in 2009.

149. PDVSA also engages in extensive commercial activity in the United States with its U.S.-based subsidiary, CITGO, which describes itself as "PDVSA's principal outlet for heavy sour crude oil *in the U.S. market.*" (Emphasis added).

150. Under a contract set to expire January 1, 2012, PDVSA is obligated to supply CITGO a minimum quantity of 10,000 barrels per day of naphtha, which is used primarily as feedstock for producing high octane gasoline.

151. PDVSA also enters into agreements with CITGO for management and administration of the procurement of equipment and other goods and services for PDVSA. PDVSA pays CITGO for these services by offsetting amounts payable under a crude oil supply contract between CITGO and PDVSA.

152. PDVSA also engaged in a loan transaction in the United States when it borrowed one billion U.S. Dollars from CITGO in December 2007. PDVSA still holds the loan and, on information and belief, continues to make periodic payments to CITGO in the United States to maintain that loan.

153. PDVSA also owns a 50-percent stake in Hovensa LLC, a joint venture with the Hess Corporation located on St. Croix, U.S. Virgin Islands. Hovensa is one of the largest oil refineries in the world, with a daily processing capacity of 500,000 barrels per day. Hovensa processes crude oil primarily supplied by PDVSA and distributes it as gas and heating oil in the United States. On information and belief, PDVSA sends tankers carrying crude oil into U.S. territory to supply the Hovensa refinery.

154. PDVSA is also the immediate parent of Bitor America Corporation, a petroleum wholesale distribution company that was incorporated in Delaware in 1989 and has a business address in Boca Raton, Florida.

155. PDVSA owns a 50-percent stake in Chalmette Refining, LLC, a petroleum refinery in Chalmette, Louisiana. Chalmette Refining, LLC has annual sales of $5.6478 billion and employs 600 employees.

156. PDVSA-P is also engaged in commercial activity in the United States. For example, on December 1, 2008, PDVSA-P and CITGO entered into a crude oil supply agreement set to expire March 31, 2012, with automatic renewals for successive 12-month terms unless terminated by either party. Under the contract, CITGO purchases 250,000 barrels of oil per day from PDVSA-P for CITGO's refineries in Lake Charles, Louisiana, and Corpus Christi, Texas, which, on information and belief, PDVSA ships to the United States.

157 These long-term supply contracts, aimed at and intended for the United States market, are

prototypical examples of commercial activity in the United States.

158. The PDVSA Defendants have also engaged in extensive commercial activity in the United States within the context of the instant case. Specifically, on May 24, 2010, the PDVSA Defendants met with H&P personnel at the headquarters of PDVSA's indirect subsidiary, CITGO Petroleum Corporation, in Houston, Texas, to discuss a payment schedule for past debt, as well as possible terms and conditions for H&P-V to re-commence drilling operations. Negotiating a potential commercial contract is itself a commercial activity.

159. Similarly, the PDVSA Defendants engaged in a commercial activity that relates directly to the claims in this case when they agreed to make—and subsequently and repeatedly made—payments in U.S. Dollars to a U.S. bank account in Tulsa, Oklahoma, pursuant to the drilling contracts and related agreements with H&P-V. Even standing alone, these payments constitute commercial activities within the meaning of the FSIA.

I. The Inherent Unfairness and Partiality of Venezuelan Courts

160. The Venezuelan judiciary is politically controlled by the Chávez regime, and it lacks basic due process and impartiality. As a result, and as previously alleged, private parties cannot and do not prevail in litigation against the government, and private companies whose property has been taken are unable to obtain just compensation in Venezuelan courts.

161. The Venezuelan judiciary is politically controlled by President Chávez and the political

party he created in 2007, the United Socialist Party of Venezuela ("PSUV"). President Chávez controls the National Assembly through Chávez loyalists in the PSUV, which won all the seats two elections ago and an overwhelming majority of seats in the last election. President Chávez controls the courts in part by controlling the National Assembly, the majority of which belong to his party and support his regime; the National Assembly, in turn, is empowered to appoint and remove justices on Venezuela's highest court (the "Supreme Tribunal of Justice" or "STJ"). *See* U.S. Department of State, *2010 Human Rights Report: Venezuela* (Apr. 8, 2011).

162. President Chávez also contrived to dominate the STJ by inducing a simple majority of the National Assembly to add nine more Chávez loyalists. *See* U.S. Department of State, *Background Note: Venezuela* (Sept. 2, 2011).

163. The STJ, in turn, controls the lower courts by hearing appeals and also by exercising its authority to hire and fire certain temporary judges "without cause or explanation." *See* U.S. Department of State, *2010 Human Rights Report: Venezuela* (Apr. 8, 2011). As a result, "all courts in the country . . remain[] subject to strong executive control." *Id.*

164. These and other conditions have led to a lack of due process and impartiality in Venezuelan courts. In recent years, the Venezuelan judiciary has been plagued by "corruption, inefficiency, and politicization," as well as "trial delays and violations of due process." *See id.* The "judicial branch's lack of independence and autonomy from the political branches of government [have] made it one of the

weakest pillars in Venezuelan democracy." IACHR, *2010 Annual Report*. In a recent study, Venezuela ranked in the bottom 2.8 percent worldwide in "Rule of Law" indicators, and the bottom 8.1 percent in "Corruption" indicators. *See* World Bank Global Governance Indicator Data (2009).

165. Moreover, conditions in the Venezuelan judiciary have deteriorated since 2007. The U.S. Department of State reports that the "[p]oliticization of the judiciary . . . intensified during [2009]." U.S. Department of State, 2009 Human Rights Report: Venezuela (Mar. 11, 2010). According to the Property Rights Alliance's 2011 Report, Venezuela's "Control of Corruption and Rule of Law" scores both "declined in 2011, with the latter falling to the lowest score *in the world*."

166. As the Venezuelan judiciary has declined, there have been recent increases in both the rate and number of removals of provisional judges, who "can be easily removed when they adopt decisions that could affect government interests." *See* IACHR, *Country Report: Democracy and Human Rights in Venezuela* (Dec. 30, 2009).

167. In February 2011, a delegation of the International Bar Association ("IBA") examined the Venezuelan judiciary and concluded that "the situation of the independence of the judiciary has deteriorated significantly since the last visit of the [IBA] in 2007." *See* Int'l Bar Assoc'n, *Distrust in Justice: The Afiuni Case and the Independence of the Judiciary in Venezuela (Executive Summary)* (April 2011).

168. Under these circumstances, private parties, especially U.S. Companies, now stand no chance of

prevailing in a Venezuelan court against the Chávez government. According to a recent academic study reported by the U.S. Department of State, the court that would have appellate jurisdiction if this matter were litigated in Venezuela "ruled in favor of the government in 324 of the 325 cases brought by private citizens against the government." *See* U.S. Department of State, *2009 Human Rights Report: Venezuela*. On information and belief, the sole case decided in favor of a private party "was later annulled by the Constitutional Chamber of the Supreme Tribunal of Justice, by using a special power that had never before been used in Venezuelan judicial history. Likewise, from October 2009 to October 2010, the Venezuelan high court "rejected 90 percent of judicial cases" against instrumentalities of the government "and all 21 legal actions against President Chávez." *See* U.S. Department of State, *2010 Human Rights Report: Venezuela*.

169. Venezuelan judges who have decided cases against the Chávez government have been reversed and removed. There is a "long list of judges who have been removed after handing down decisions that affected government interests." IACHR, *Country Report: Democracy and Human Rights in Venezuela* (Dec. 30, 2009). Venezuelan judges are "not free to adopt decisions that go against the government's interests; if they do, they run the risk of being removed from the bench, prosecuted and subjected to conditions that violate human dignity." *See* IACHR, *2010 Annual Report* (Mar. 7, 2011); *see also* U.S. Department of State, *2010 Human Rights Report: Venezuela*.

170. For example, three court of criminal appeals judges were removed one day after releasing a number of anti-government demonstrators. *See* IACHR, *2010 Annual Report*. In another recent example, government agents stormed the courtroom of a Venezuelan judge and arrested her within minutes of her issuing a decision that a detainee's rights had been violated by the government. Two days after her arrest, President Chávez publicly called for her imprisonment for 30 years as a lesson to other judges. *Id.* She was subsequently imprisoned and subjected to physical mistreatment. *Id.*

171. Proceedings in the Venezuelan courts cannot result in adequate relief here for the additional reason that, even in the unlikely event the Venezuelan courts award compensation, they could do so only in Venezuelan currency. Payment in a non-convertible currency does not constitute "just compensation" under international law. The Venezuelan currency is non-convertible. Foreign currency exchanges are controlled by the Venezuelan government's Commission for the Administration of Foreign Exchange ("CADIVI"), which "often delays or refuses the applications of private companies, limiting or denying their access to foreign exchange." *See* Bureau of Economic, Energy and Business Affairs, U.S. Department of State, *2010 Investment Climate Statement: Venezuela* (March 2011). Indeed, CADIVI has refused for years to grant H&P-V's pending applications to exchange Bolivars for U.S. Dollars for the purpose of remitting dividends to the United States.

Count I

(Taking in Violation of International Law)

172. Plaintiffs re-allege and repeat the allegations as against all Defendants, as contained in paragraphs 1-171, above.

173. Defendant Venezuela is a foreign sovereign, and a "foreign state" within the meaning of the FSIA.

174. Defendants PDVSA and PDVSA-P are agencies or instrumentalities of Venezuela, and are therefore "foreign states" within the meaning of FSIA.

175. The PDVSA Defendants have extensive commercial activities in the United States, including billions of U.S. Dollars in oil exports to the United States.

176. H&P-IDC is a U.S. company that wholly owns H&P-V. Under Venezuelan law, Plaintiff H&P-V is a "foreign" company, required to register as such, and it is a foreign national, with respect to Venezuela, under international law.

177. Prior to the expropriation, Plaintiffs had full ownership of the business and assets that were confiscated.

178. Today, pursuant to the official acts of Defendant Venezuela, the PDVSA Defendants own and operate the business and assets that were confiscated.

179. Defendants' acts of expropriation are in violation of international law.

180. Defendants' confiscation of Plaintiffs business and assets is discriminatory, based on Plaintiffs' status as foreign (*i.e.*, U.S.) companies vis-

à-vis Venezuela, and/or Plaintiffs' connections to the United States.

181. Defendants' confiscation of Plaintiffs' business and assets was undertaken without prompt, adequate, and effective compensation. More than a year has passed since the unlawful taking and Defendants have failed entirely to provide any adequate forum and process to obtain compensation, much less an actual payment of prompt, adequate, and effective compensation, as required by international law. Venezuelan legal process will never provide prompt, adequate, and effective compensation for the seized business and assets.

Count II

(Breach of Contract)

Count II(A)—Contract No. 4600013176

182. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

183. The parties entered into a valid contract concerning the operation of H&P's Rig HP-160 in Venezuela, Contract No. 4600013176, as amended by the 61-39 Agreement (collectively, "Contract No. 4600013176").

184. Contract No. 4600013176 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

185. Contract No. 4600013176 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

186. Contract No. 4600013176 required the PDVSA Defendants to pay for drilling operations.

187. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600013176. Amounts remain due under Contract No. 4600013176.

188. The breach of Contract No. 4600013176 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

189. The breach of Contract No. 4600013176 had direct effects in the United States.

190. Plaintiffs have fully performed any and all obligations under Contract No. 4600013176. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

191. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600013176 have directly harmed Plaintiffs.

Count II(B)—Contract No. 4600016461

192. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

193. The parties entered into a valid contract concerning the operation of H&P's Rig HP-135 in Venezuela, Contract No. 4600016461.

194. Contract No. 4600016461 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

195. Contract No. 4600016461 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

196. Contract No. 4600016461 required the PDVSA Defendants to pay for drilling operations.

197. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600016461. Amounts remain due under Contract No. 4600016461.

198. The breach of Contract No. 4600016461 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

199. The breach of Contract No. 4600016461 had direct effects in the United States.

200. Plaintiffs have fully performed any and all obligations under Contract No. 4600016461. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

201. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600016461 have directly harmed Plaintiffs.

Count II(C)—Contract No. 4600017135

202. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171, above.

203. The parties entered into a valid contract concerning the operation of H&P's Rig HP-113 in Venezuela, Contract No. 4600017135, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017135").

204. Contract No. 4600017135 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

205. Contract No. 4600017135 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

206. Contract No. 4600017135 required the PDVSA Defendants to pay for drilling operations.

207. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017135. Amounts remain due under Contract No. 4600017135.

208. The breach of Contract No. 4600017135 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

209. The breach of Contract No. 4600017135 had direct effects in the United States.

210. Plaintiffs have fully performed any and all obligations under Contract No. 4600017135. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

211. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017135 have directly harmed Plaintiffs.

Count II(D)—Contract No. 4600017140

212. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

213. The parties entered into a valid contract concerning the operation of H&P's Rig HP-115 in Venezuela, Contract No. 4600017140, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017140").

214. Contract No. 4600017140 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

215. Contract No. 4600017140 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

216. Contract No. 4600017140 required the PDVSA Defendants to pay for drilling operations.

217. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017140. Amounts remain due under Contract No. 4600017140.

218. The breach of Contract No. 4600017140 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

219. The breach of Contract No. 4600017140 had direct effects in the United States.

220. Plaintiffs have fully performed any and all obligations under Contract No. 4600017140. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

221. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017140 have directly harmed Plaintiffs.

Count II(E)—Contract No. 4600017141

222. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

223. The parties entered into a valid contract concerning the operation of H&P's Rig HP-127 in Venezuela, Contract No. 4600017141, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017141").

224. Contract No. 4600017141 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

225. Contract No. 4600017141 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

226. Contract No. 4600017141 required the PDVSA Defendants to pay for drilling operations.

227. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017141. Amounts remain due under Contract No. 4600017141.

228. The breach of Contract No. 4600017141 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

229. The breach of Contract No. 4600017141 had direct effects in the United States.

230. Plaintiffs have fully performed any and all obligations under Contract No. 4600017141. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

231. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017141 have directly harmed Plaintiffs.

Count II(F)—Contract No. 4600017142

232. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

233. The parties entered into a valid contract concerning the operation of H&P's Rig HP-128 in Venezuela, Contract No. 4600017142, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017142").

234. Contract No. 4600017142 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

235. Contract No. 4600017142 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

236. Contract No. 4600017142 required the PDVSA Defendants to pay for drilling operations.

237. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017142. Amounts remain due under Contract No. 4600017142.

238. The breach of Contract No. 4600017142 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

239. The breach of Contract No. 4600017142 had direct effects in the United States.

240. Plaintiffs have fully performed any and all obligations under Contract No. 4600017142. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

241. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017142 have directly harmed Plaintiffs.

Count II(G)—Contract No. 4600017143

242. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

243. The parties entered into a valid contract concerning the operation of H&P's Rig HP-129 in Venezuela, Contract No. 4600017143, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017143").

244. Contract No. 4600017143 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

245. Contract No. 4600017143 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

246. Contract No. 4600017143 required the PDVSA Defendants to pay for drilling operations.

247. The PDVSA Defendants failed to make timely and complete payments, as obligated to so under Contract No. 4600017143. Amounts remain due under Contract No. 4600017143.

248. The breach of Contract No. 4600017143 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

249. The breach of Contract No. 4600017143 had direct effects in the United States.

250. Plaintiffs have fully performed any and all obligations under Contract No. 4600017143. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

251. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017143 have directly harmed Plaintiffs.

Count II (H)—Contract No. 4600017145

252. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

253. The parties entered into a valid contract concerning the operation of H&P's Rig HP-150 in Venezuela, Contract No. 4600017145, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017145").

254. Contract No. 4600017145 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

255. Contract No. 4600017145 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

256. Contract No. 4600017145 required the PDVSA Defendants to pay for drilling operations.

257. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017145. Amounts remain due under Contract No. 4600017145.

258. The breach of Contract No. 4600017145 occurred outside the United States, in Venezuela,

and was in connection with commercial activity elsewhere.

259. The breach of Contract No. 4600017145 had direct effects in the United States.

260. Plaintiffs have fully performed any and all obligations under Contract No. 4600017145. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

261. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017145 have directly harmed Plaintiffs.

Count II(I)—Contract No. 4600017146

262. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

263. The parties entered into a valid contract concerning the operation of H&P's Rig HP-153 in Venezuela, Contract No. 4600017146, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017146").

264. Contract No. 4600017146 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

265. Contract No. 4600017146 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

266. Contract No. 4600017146 required the PDVSA Defendants to pay for drilling operations.

267. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so

under Contract No. 4600017146. Amounts remain due under Contract No. 4600017146.

268. The breach of Contract No. 4600017146 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

269. The breach of Contract No. 4600017146 had direct effects in the United States.

270. Plaintiffs have fully performed any and all obligations under Contract No. 4600017146. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

271. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017146 have directly harmed Plaintiffs.

Count II(J)—Contract No. 4600017147

272. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

273. The parties entered into a valid contract concerning the operation of H&P's Rig HP-174 in Venezuela, Contract No. 4600017147, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017147").

274. Contract No. 4600017147 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

275. Contract No. 4600017147 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

276. Contract No. 4600017147 required the PDVSA Defendants to pay for drilling operations.

277. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017147. Amounts remain due under Contract No. 4600017147.

278. The breach of Contract No. 4600017147 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

279. The breach of Contract No. 4600017147 had direct effects in the United States.

280. Plaintiffs have fully performed any and all obligations under Contract No. 4600017147. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

281. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017147 have directly harmed Plaintiffs.

RELIEF REQUESTED

282. WHEREFORE, Plaintiffs request that this Court award a judgment on all Counts and award it such damages and compensation, including interest, attorneys fees, costs and such other relief as this Court may deem just.

Dated: September 23, 2011

Respectfully submitted,

/s/ David W. Ogden
David W. Ogden (D.C. Bar No. 375951)

Elisebeth Collins Cook (D.C. Bar No. 479592)
Francesco Valentini (D.C. Bar No. 986769)
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
E-mail: david.ogden@wilmerhale.com
Attorneys for Plaintiffs

District Court's Order (Jan. 11, 2013)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:11-cv-01735

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Plaintiffs,

vs.

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Defendants.

Filed: January 11, 2013

[ORDER ON] JOINT STIPULATION AND MOTION TO ESTABLISH A BRIEFING SCHEDULE FOR THE ADJUDICATION OF DEFENDANTS' MOTIONS TO DISMISS

WHEREAS, on September 23, 2011, Helmerich & Payne International Drilling Co. and Helmerich & Payne de Venezuela C.A. (together, "Plaintiffs") filed the complaint against the Bolivarian Republic of Venezuela, Petróleos de Venezuela, S.A., and PDVSA Petróleo, S.A. ("Defendants"), claiming that Defendants committed a taking in violation of international law when Plaintiffs' property was expropriated and that Defendants committed multiple breaches of contract when they failed to pay

for oil drilling services performed by Plaintiffs, Dkt. No. 1;

WHEREAS, on August 31, 2012, Defendants filed motions pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), and (6), arguing that Plaintiffs' claims should be dismissed for lack of standing, lack of subject matter jurisdiction due to Defendants' sovereign immunity, lack of personal jurisdiction, and based on the act of state doctrine, what Defendants contend is a forum selection clause, and the doctrine of *forum non conveniens*, Dkt. Nos. 22-24;

WHEREAS, on October 1, 2012, Plaintiffs propounded preliminary discovery requests for jurisdictional and other discovery in response to arguments in the motions to dismiss that in Plaintiffs' perception challenged the factual bases of the Court's jurisdiction, contested certain jurisdictional facts alleged by Plaintiffs, and relied on testimony and other materials or factual assertions extraneous to the complaint, Dkt. No. 29;

WHEREAS, on October 23, 2012, following discussions and correspondence among the parties regarding preliminary discovery relevant to the adjudication of Defendants' motions to dismiss, Plaintiffs moved to compel certain discovery related to the Declaration of Adriana Padilla Alfonzo, which had been submitted as an exhibit to the PDVSA Defendants' motion to dismiss, Dkt. No 29;

WHEREAS, on November 21, 2012, Defendants opposed Plaintiffs' motion to compel on, *inter alia*, the ground that certain of the arguments in the motions to dismiss can be resolved as a matter of law solely on the basis of the allegations in the complaint

and the documents referenced therein, without the need for discovery, Dkt. No. 32, while also relying on Dr. Padilla's declaration in support of other arguments regarding what Defendants refer to as the forum selection clause, and noting that the parties had agreed to defer certain of the issues raised in the motions to dismiss to a later phase of the litigation;

WHEREFORE, Plaintiffs and Defendants (together, the "parties"), by and through their respective counsel, hereby STIPULATE AND AGREE, subject to the approval of the Court, that:

1. The following issues raised in Defendants' motions to dismiss shall be adjudicated solely on the basis of the Plaintiffs' allegations (including the materials attached as exhibits or referenced in the complaint), assuming the truth of all well-pleaded factual allegations in the complaint, and construing the complaint in the light most favorable to Plaintiffs:

(A) Whether, for purposes of determining whether a "taking in violation of international law" has occurred under the expropriation exception of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(3), Plaintiff Helmerich & Payne de Venezuela C.A. is a national of Venezuela under international law;

(B) Whether Plaintiffs' expropriation claims are barred by the act of state doctrine, including the issue whether this defense may be adjudicated prior to the resolution of Defendants' challenges to the Court's subject matter jurisdiction;

(C) Whether, for purposes of determining the applicability of the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), Plaintiffs have sufficiently alleged a "direct effect" in the United States within the meaning of that provision; and

(D) Whether Plaintiff Helmerich & Payne International Drilling Co. has standing.

(collectively, the "Initial Issues");

2. The parties stipulate that they shall rely on no factual evidence, apart from the allegations of the complaint and documents referenced therein, and no arguments based upon such evidence, in connection with the resolution of the Initial Issues.

3. The parties stipulate that Plaintiffs shall brief the Initial Issues in their next round of briefing and reserve argument on the additional issues raised in the motions to dismiss (the ownership or operation of the expropriated assets, application and enforceability of what Defendants refer to as a forum selection clause, and *forum non conveniens* (hereafter "Additional Issues")) until a second phase of briefing on the motions to dismiss. The parties stipulate that the Court should resolve the Initial Issues first, and should not rule on the Additional Issues until it has decided those Initial Issues and, if the motions based upon the Initial Issues are denied in whole or in part such that a claim or claims remain, a second phase of briefing has been concluded. Plaintiffs reserve the right to seek discovery related to any factual issues raised by Defendants' motions prior to filing a responsive brief with respect to such Additional Issues.

4. If the Court approves this stipulation, Plaintiffs agree to withdraw without prejudice their October 23, 2012 motion to compel discovery and request for oral argument (currently scheduled for January 14, 2013), and the parties stipulate in that event that the scheduled argument may be canceled;

5. Plaintiffs shall file their opposition to Defendants' motions to dismiss no later than six (6) weeks after entry of an order approving this stipulation, and Defendants shall file their reply four (4) weeks thereafter;

6. Plaintiffs shall file a consolidated opposition brief on the Initial Issues of no more than 60 pages, and Defendant Venezuela and the PDVSA Defendants shall file respective reply briefs of no more than 25 pages each; and

7. This stipulation is made without prejudice to Plaintiffs seeking leave to file an amended complaint. No party waives any right to appeal a decision, nor does any party waive any other rights except as provided by the express terms of this stipulation.

SO ORDERED this 11th day of January, 2013

/s/ Hon. Robert L. Wilkins
Hon. Robert L. Wilkins
United States District Judge

Dated: January 10, 2013

Respectfully submitted,

HOGAN LOVELLS US LLP

By: */s/ William L. Monts III*
William L. Monts III (D.C. Bar No. 428856)
555 Thirteenth Street, NW
Washington, DC 20004-1009
Tel.: (202) 637-5600
Fax: (202) 637-5910
Email: william.monts@hoganlovells.com

-and-

By: */s/ Bruce D Oakley*
Bruce D. Oakley (D.C. Bar No. TX0102)
700 Louisiana Street, Suite 4300
Houston, Texas 77002
Tel. (713) 632-1400
Fax (713) 632-1401
Email: bruce.oakley@hoganlovells.com
Attorneys for Defendant
Bolivarian Republic of Venezuela

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

By: */s/ Joseph D. Pizzurro*
Joseph D. Pizzurro, Esq. (D.C. Bar No. 468922)
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Tel.: (202) 452-7373
Fax: (202) 452-7333
Email: jpizzurro@curtis.com

WILLIAM CUTLER PICKERING HALE AND DORR LLP

By: */s/ David W. Ogden*
David W. Oden (D.C. Bar No. 375951)
David W. Bowker (D.C. Bar No. 989309)
Elisebeth Collins Cook (D.C. Bar No. 479592)
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
E-mail: david.ogden@wilmerhale.com
Attorneys for Plaintiffs

Of Counsel:
Robert B. García, Esq. (*pro hac vice*)
George E. Spencer, Esq. (*pro hac vice*)
101 Park Avenue
New York, New York 10178
Tel.: (212) 696-6000
Fax: (212) 697-1559
Email: robert.garcia@curtis.com
gspencer@curtis.com
Attorneys for Defendants Petróleos de Venezuela, S.A. and PDVSA Petróleo, S.A.

District Court's Memorandum Opinion (Sept. 20, 2013)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 11-cv-1735 (RLW)

HELMERICH & PAYNE INTERNATIONAL DRILLING CO. and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Defendants.

MEMORANDUM OPINION

I. INTRODUCTION

This case involves a longstanding and apparently formerly productive contractual relationship that has since broken down. Although Defendants filed motions to dismiss, subsequent to the filing of those motions all parties asked, and this Court agreed, to hold those motions in abeyance so as to first answer four questions central to the disposition of the motions. This Memorandum Opinion addresses those four questions, along with a motion filed by Plaintiffs asking the Court to "enforce" the parties' Joint Stipulation regarding the handling of the four questions. As detailed below, the Court's answers to

the questions, and the resolution of Plaintiffs' motion, do not fully resolve the motions to dismiss, and therefore additional briefing will be necessary on the remaining arguments raised in Defendants' motions.

II. FACTUAL SUMMARY

A. Issue Background[1]

Helmerich & Payne International Drilling Co. (H&P-IDC) is a Delaware-incorporated, Tulsa, Oklahoma-based corporation that wholly owns the subsidiary Helmerich & Payne de Venezuela, C.A. (H&P-V) (collectively, Plaintiffs). (Dkt. No. 1, ¶¶ 2, 9). H&P-V "is incorporated in Venezuela," and "had its principal Venezuelan office in Anaco, Venezuela . . ." (*Id.* ¶ 10). Plaintiffs are oil and gas drilling companies. (*Id.* ¶¶ 9-10). H&P-V began providing contract oil and gas drilling services in Venezuela in the 1970s; H&P-IDC had been operating in Venezuela through wholly-owned subsidiaries since 1954. (*See id.* ¶ 16). Venezuela's Superintendent of Foreign Investment, which is part of the country's Finance Ministry, issued H&P-V a Company Qualification Certificate stating the company "is . . . considered a FOREIGN COMPANY at all relevant legal effects." (*Id.* ¶¶ 100, 102) (capitalization in original).

---

[1] Unless specifically noted otherwise, this summary is based on facts alleged in Plaintiffs' Complaint, which are presumed true. (*See* Dkt. No. 34, at 3 ("The parties stipulate that they shall rely on no factual evidence, apart from the allegations of the complaint and documents referenced therein, and no arguments based upon such evidence, in connection with the resolution of the Initial Issues.")).

There are three Defendants in this case. One is the Bolivarian Republic of Venezuela (Venezuela), which of course is a country on the northern coast of South America. The other two are entities owned and controlled by Venezuela: Petróleos de Venezuela, S.A. (PDVSA) and PDVSA Petróleo, S.A. (Petróleo). (*See id.* ¶ 2). PDVSA and Petróleo are energy corporations "that by law enjoy a monopoly on Venezuela's oil reserves." (*Id.*). Petróleo, a wholly owned subsidiary of PDVSA, is the exploration and operating arm of PDVSA. (*Id.* ¶ 13). The PDVSA Defendants concede they are agencies or instrumentalities of Venezuela, as that term is defined at 28 U.S.C. § 1603(b). (*See* Dkt. No. 22-1, at 13).

Beginning around 1997, H&P-V provided contract drilling services exclusively to the PDVSA Defendants and other entities owned by Venezuela. (*See* Dkt. No. 1, ¶ 2). H&P-V and Petróleo signed each contract. (*See id.* ¶¶ 30, 32). This work involved, among other things, "the largest, most powerful, and deepest-drilling, land-based drilling rigs available." (*Id.* ¶¶ 21, 26). At issue in this litigation are ten "fixed term" drilling contracts signed in 2007 to be performed by H&P-V on a "day-rate" basis. (*Id.* ¶¶ 30, 33-35). "The agreed-upon daily rates for H&P-V . . were partially set forth in U.S. Dollars and partially in Venezuelan currency ('Bolivars' or 'Bolivar Fuertes')." (*Id.* ¶ 37) (footnote omitted). "H&P-V separately invoiced the amounts due in U.S. Dollars ('Dollar-based invoices') and the amounts due in Venezuelan currency ('Bolivar-based invoices')." (*Id.* ¶ 38).

Of the ten contracts, one related to drilling in the western region of Venezuela, and the rest related to

drilling in the eastern region. (*Id.* ¶¶ 39-40). The former contract required the Dollar-based invoices to be paid "in U.S. Dollars in the United States" under certain conditions. (Dkt. No. 40-3, at 21-22 (§ 18.14)).[2]

---

[2] Specifically, the western drilling contract provides at § 18.14 that:

> "If as a result of the exchange control measures established by the competent authorities, [H&P-V] is unable to obtain in a timely fashion the foreign currency required to perform its obligations abroad related to the performance of this CONTRACT, [Petróleo] agrees to pay in United States dollars the portion of the price of this CONTRACT set in said currency, in accordance with current regulation, "Norms and Procedures for the Payment of Foreign Exchange for Construction, Goods and Services in the Western Division," for those items directly associated with the external component pursuant to the results of the corresponding audit. [H&P-V] shall indicate, for purposes of payment, the bank and account number where payments are to be made. [H&P-V] agrees:
>
> a) That the deposits made by [Petróleo] in the referenced accounts will release [Petróleo] from its obligation to pay the portion of the price set in United States Dollars to the extent of the deposits made.
>
> b) That it will not request from the commercial bank or other foreign exchange operators the acquisition of foreign currency corresponding to the amounts deposited by [Petróleo] in the aforementioned account; and that if it should do so, it will immediately return to [Petróleo], in dollars, the amounts that it would have deposited.
>
> c) That the payment in U.S. dollars, as set forth in this section, is of a temporary nature and, consequently, [Petróleo] may pay the portion of the price established in US dollars in Bolivars, at the exchange rate in effect at the place and time of payment, when, in [Petróleo]'s judgment, the grounds that gave rise to this form of

The remaining nine contracts "were supplemented" by a 2008 agreement signed by H&P-V and PDVSA, (Dkt. No. 1, In 40-41), that required the PDVSA Defendants to pay "invoices issued [by H&P-V] corresponding to the contract's foreign currency component . . . in actual dollars at 61% . . abroad in the [Tulsa, Oklahoma] account specified by [H&P-V]," while "the remaining portion, 39%, shall be paid in equivalent bolivars at the official exchange rate," (Dkt. No. 40-7, at 2 (¶¶ 1-2). "This 2008 agreement reiterated the terms of an earlier 2003 agreement, which similarly provided for a set percentage of the PSVSA Defendants' payments to be remitted in U.S. Dollars to a bank account in the United States." (Dkt. No. 1, ¶ 118). "Thus, under each of the contracts at issue, the PDVSA Defendants were required to make payments to H&P-V in U.S. Dollars directly to H&P-V's designated bank account at the Bank of Oklahoma in Tulsa, Oklahoma." (*Id.* ¶ 43).

Around 2007,[3] the PDVSA Defendants "began systematically to breach those contracts" in an amount that eventually amounted to over $32 million in unpaid invoices. (*See id.* ¶¶ 6, 56). In January 2009, H&P, Inc., the parent company of H&P-IDC, (*id.* ¶ 9), "announced it would 'cease[] operations on rigs as their drilling contracts expire'

> temporary payment have ceased. In no case shall [Petróleo] recognize expenses for commissions and/or transfers that [H&P-V] may incur for purchasing foreign exchange."

[3] The Complaint states both that "[s]tarting in 2007" the PDVSA Defendants "fell substantially behind in their payments to H&P-V," (Dkt. No. 1, ¶ 46), and that they "began" to breach the contracts at issue "in late 2008 and 2009," (*id.* ¶ 6).

and not renew its subsidiary's contracts with the PDVSA Defendants absent an 'improvement in receivable collections,' (*id.* ¶ 50). By November 2009, H&P-V had finished its contractually-obligated work and disassembled its equipment. (*See id.* ¶ 53). In 2010, the PDVSA Defendants stopped making payments altogether. (*Id.* ¶¶ 44, 56). Prior to that, they "made at least 55 payments totaling roughly $65 million into H&P-V's designated bank account in Tulsa," in addition to payments made in Bolivars. (*See id.* ¶ 44). The PDVSA Defendants and Plaintiffs met in Houston on May 24, 2010, in an attempt to work out a solution, but were unsuccessful. (*See id.* ¶ 55).

Between June 12 and 14, 2010, the PDVSA Defendants, with assistance from the Venezuelan National Guard, "surrounded and unlawfully blockaded" H&P-V's business premises in western and eastern Venezuela. (*Id.* ¶ 3). "PDVSA's Director of Services expressly informed H&P-V's Administrative Manager that Defendants intended the blockade to prevent H&P-V from removing its rigs and other assets from its premises, and to force H&P-V to negotiate new contract terms immediately." (*Id.* ¶ 63). On June 23, 2010, PDVSA issued a press release stating they had nationalized eleven drilling rigs belonging to "Helmerich & Payne (HP), a U.S. transnational firm." (*Id.* ¶ 65). Two days later, PDVSA issued another press release, which referred to "[t]he nationalization of the oil production drilling rigs from the American contractor H&P . . . " (*Id.* ¶ 66).

On June 29, 2010, the Venezuelan National Assembly issued a Bill of Agreement declaring H&P-V's property to be of public interest, and

recommended to then President Hugo Chávez that he issue a Decree of Expropriation. (*Id.* ¶¶ 3-4). That day, President Chávez issued Presidential Decree No. 7532, directing PDVSA "or its designee affiliate" to seize H&P-V's property. (*See id.* ¶ 4). Also on that same day, the PDVSA Defendants hired a notary to "conduct a judicial inspection of the rigs and other assets" in the eastern (but not western) region of Venezuela. (*Id.* ¶ 71). "H&P-V hired a notary to accompany the PDVSA Defendants' notary; H&P-V's notary simultaneously performed a rushed and incomplete inspection in the limited time available that day." (*Id.*). The property encompasses more than just the drilling rigs, including, for example, real property, vehicles, and various equipment. (*See id.* ¶¶ 77-80). At some time after that, Minister Ramírez, Venezuela's Minister of Energy and Petroleum and also President of PDVSA, spoke in eastern Venezuela at what had been H&P-V's premises there about the seizure, referring to H&P-V as an "American company" with "foreign gentlemen investors" that would now "become part of the payroll" of PDVSA. (*Id.* ¶ 5). On July 1, 2010, Petróleo filed two eminent domain proceedings in Venezuela, one in the eastern region and one in the western. (*Id.* ¶¶ 72-73). In the former, as of September 2011, "H&P-V still has not been afforded the opportunity to appear," and in the latter "those proceedings have not progressed past the earliest stage of the case." (*Id.*). Plaintiffs have received no compensation from Venezuela with respect to the seizure of their drilling rigs and related items. (*Id.* ¶ 86).

B. Procedural Background

Plaintiffs filed their Complaint in September 2011 against Defendants under two provisions of the Foreign Sovereign Immunities Act (FSIA): the commercial activities exception[4] and the expropriation exception.[5] (*Id.* ¶ 1). The Complaint states two counts:

> Taking in Violation of International Law, and Breach of Contract. In three briefs filed separately on August 31, 2012—two by Venezuela, and one by the PDVSA entities—Defendants moved to dismiss. (Dkt. Nos. 22-24). Before opposing the motions to dismiss, Plaintiffs filed a motion to compel discovery, (Dkt. No. 29), which was fully briefed but ultimately

---

[4] 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.").

[5] 28 U.S.C. § 1605(a)(3) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.").

denied without prejudice because the parties instead agreed to a Joint Stipulation, (*see* Dkt. No. 36).

The Joint Stipulation lists four issues raised in the motions to dismiss, termed the "Initial Issues," that the parties "shall brief . . . in their next round of briefing and reserve argument on the additional issues raised in the motions to dismiss . . . ." (Dkt. No. 36, at 3). The four Initial Issues are:

> (A) Whether, for purposes of determining whether a 'taking in violation of international law' has occurred under the expropriation exception of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(3), Plaintiff Helmerich & Payne de Venezuela C.A. is a national of Venezuela under international law;
>
> (B) Whether Plaintiffs' expropriation claims are barred by the act of state doctrine, including the issue whether this defense may be adjudicated prior to the resolution of Defendants' challenges to the Court's subject matter jurisdiction;
>
> (C) Whether, for purposes of determining the applicability of the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), Plaintiffs have sufficiently alleged a 'direct effect' in the United States within the meaning of that provision; and
>
> (D) Whether Plaintiff Helmerich & Payne International Drilling Co. has standing.

(*Id.* at 3). The Joint Stipulation states that these four issues "shall be adjudicated solely on the basis of the Plaintiffs' allegations (including the materials

attached as exhibits or referenced in the complaint), assuming the truth of all well-pleaded factual allegations in the complaint, and construing the complaint in the light most favorable to Plaintiffs." (*Id.* at 2-3). It also states the following: "The parties stipulate that Plaintiffs shall brief the Initial Issues in their next round of briefing and reserve argument on the additional issues raised in the motions to dismiss (the ownership or operation of the expropriated assets, application and enforceability of what Defendants refer to as a forum selection clause, and *forum non conveniens* (hereafter 'Additional Issues')) until a second phase of briefing on the motions to dismiss." (*Id.* at 3).

Following the agreement on the Joint Stipulation, the parties completed the briefing on the motions to dismiss. Shortly thereafter, Plaintiffs filed a motion to enforce the Joint Stipulation, claiming that the PDVSA Defendants violated the Joint Stipulation by arguing "that the Court cannot exercise personal jurisdiction over the PDVSA Defendants consistent with constitutional due process," which Plaintiffs state is not among the four Initial Issues. (*See* Dkt. No. 45, at 3). Plaintiffs ask that portions of the PDVSA Defendants' Reply that "contain the constitutional due process argument" be stricken. (*See id.* at 5-6). In their Opposition to the motion to enforce, the PDVSA Defendants argue that "a due process analysis is directly related to a determination of direct effect because the FSIA's commercial activity exception cannot grant personal jurisdiction where the Constitution forbids it." (Dkt. No. 46, at 9).

III. ANALYSIS OF INITIAL ISSUES

The Court will address the four Initial Issues in the order they appear in the parties' Joint Stipulation. In addition, as part of answering the question regarding whether the Plaintiffs have sufficiently alleged a direct effect under the relevant FSIA provision, the Court will resolve Plaintiffs' motion to enforce.

A. Corporate Nationality of H&P-V

Listed first among the four Initial Issues is the question of whether H&P-V is considered a national of Venezuela under international law for the purpose of determining if a taking in violation of international law occurred under the expropriation exception of the FSIA. Based on the weight of authority reviewed below, this Court concludes that H&P-V is considered a national of Venezuela under international law.

1. Standard of Review

International law is based on, among other sources, international conventions, principles of law recognized by civilized nations, judicial opinions, and reputable scholarship. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 36-37 n.23 (D.C. Cir. 2011) (citations omitted). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (the RESTATEMENT) § 103(2) (1987) ("In determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; [and] (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by

other states."). In the absence of an applicable treaty or controlling federal precedent, "resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

2. Analysis of Relevant Authority

Because no treaty controls the determination of H&P-V's nationality, the Court must examine the sources referenced by the RESTATEMENT § 103(2) to identify statements by authorities on international law in this area. A review of key sources from both the international and national arenas, and an analysis of their application to this case, follows.

a. International Sources

For several decades, the general practice in international law has been to consider a corporation a national of the country of its incorporation. This stems in no small part from the decision of the International Court of Justice (ICJ) in *Case Concerning the Barcelona Traction, Light and Power Co. (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5) (*Barcelona Traction*). In *Barcelona Traction*, the ICJ stated that "[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments." *Id.* ¶ 70. The case also later refers to "the general rule that the right of diplomatic protection of a company belongs to its national State . . " *Id.* ¶ 93. The case

has been and remains "widely viewed not only as an accurate statement of the law on diplomatic protection of corporations but a true reflection of customary international law." *See* U.N. Int'l L. Comm'n, Fourth Report on Diplomatic Protection, U.N. Doc. A/CN.4/530, at 11 (Mar. 13, 2003), *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_530.pdf.

The ICJ recently revisited *Barcelona Traction* and substantially affirmed its earlier decision. *See Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) 2007 I.C.J. 582 (May 24) (*Diallo*). In *Diallo*, the ICJ stated that since *Barcelona Traction* "the Court has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule that the right of diplomatic protection of a company belongs to its national State, which allows for protection of the shareholders by their own national State by substitution, and on the reach of any such exception." *Id.* ¶ 87 (quotation marks and citations to *Barcelona Traction* omitted). Given the opportunity to create such an exception, the ICJ in *Diallo*, after "having carefully examined State practice and decisions of international courts and tribunals," declined to do so, finding that the universe of sources examined did not reveal, "at least at the present time," such an exception. *See id.* ¶ 89.

In *Diallo*, the ICJ also stated it was "bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the

International Centre for Settlement of Investment Disputes (ICSID) . . ." *Id.* ¶ 88. A recent pronouncement from the ICSID on corporate nationality, then, is instructive. In *Tokios Tokelès v. Ukraine*, the ICSID issued a Decision on Jurisdiction. Case No. ARB/02/18 (Apr. 29, 2004).[6] That decision states that "reference to the state of incorporation is the most common method of defining the nationality of business entities under modern [Bilateral Investment Treaties] and traditional international law." *Id.* ¶ 63 (citing Christoph H. Schreuer, *The ICSID Convention: A Commentary*, at 277 (2001)). The ICSID approvingly cites to *Barcelona Traction*, calling it "the predominant approach in international law." *Id.* ¶ 70. And the ICSID also cites to a treatise that similarly notes that "it is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its *siege social* to be in the same state." 1 OPPENHEIM'S INTERNATIONAL LAW 859-60 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed. 1996) (footnote omitted).

Given that H&P-V was incorporated in Venezuela and had multiple offices there, including its principal office in Anaco, a review of relevant international sources indicates that the company is to be considered a national of Venezuela. With that in

---

[6] The decision is available at the following cumbersome url: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC639_En&caseId=C220.

mind, the Court now turns to national sources to confirm this understanding.

b. National Sources

The RESTATEMENT is published by the American Law Institute, an organization that includes "judges, legal academicians, and lawyers in independent private practice, in government, and in law departments of business and other enterprises." *See* RESTATEMENT at XI. The most recent version of the RESTATEMENT takes a clear position on corporate nationality in international law: "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized." *Id.* § 213. The comments to § 213 support this clear statement, noting that "[t]he traditional rule stated in this section, adopted for certainty and convenience, treats every corporation as a national of the state under the laws of which it was created." *Id. cmt.* c. *See also id. cmt.* d. ("[A] corporation has the nationality of the state that created it . . . ."). The RESTATEMENT cites approvingly to *Barcelona Traction*, noting that the case "gave preference to the state of incorporation over a state with other significant links, in representing a company against a third state." *Id.* Reporters' Notes No. 3. It also rejects the suggestion that the place of the *siege social* can be an alternative basis for corporate nationality under international law, instead finding that "[i]n practical effect it is an additional requirement, since jurisdictions using that standard require that a firm be incorporated in the state where it has its *siege*." *Id. cmt.* c.

The Supreme Court has cited to § 213 of the RESTATEMENT, and the parties dispute the significance of that citation to this case. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91-92 (2002). Had the Supreme Court clearly held in *JPMorgan* that the state of incorporation is the definitive test of nationality, that would of course be the end of the analysis. But that was not the case. Nonetheless, because the case is important and neither Plaintiffs nor Defendants squarely address its significance to these facts, a brief word on the case is warranted.

Defendants slightly overstate the import of *JPMorgan*. According to the PDVSA Defendants, "[t]he Supreme Court has held that '[f]or purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.'" (Dkt. No. 22-1, at 22-23) (quoting *JPMorgan*, 536 U.S. at 91-92 (in turn quoting the RESTATEMENT § 213)). Similarly, Venezuela claims that in *JPMorgan* the Supreme Court "has held" that "a corporation has the nationality of the state under the laws of which the corporation is organized." (Dkt. No. 44, at 10) (citation omitted). But there are several indications that what Defendants claim is a holding of the Supreme Court is not actually so. One is that the quote from the RESTATEMENT was used as a parenthetical following a "*Cf.*" cite, and the quote is never discussed or analyzed. Another is that *JPMorgan* is not a case applying international law—hence, the "*Cf.*" cite—but was rather constructing a rule for corporate nationality under domestic law. *See* 536 U.S. at 98-99 ("[O]ur jurisdictional concern here is with the meaning of 'citizen' and 'subject' as those terms are used in [28 U.S.C.] § 1332(a)(2).")

(brackets and internal citation omitted). Thus, there is no clear holding from the Supreme Court in *JPMorgan* on the issue of corporate nationality under international law or the FSIA.

But that does not mean that Plaintiffs are correct when they state *JPMorgan* "has no bearing whatsoever on international law governing expropriations." (Dkt. No. 39, at 38 n.22).[7] As our Court of Appeals has explained, "[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (citation omitted). Perhaps the Supreme Court's passing citation to the RESTATEMENT fails to meet this standard, nonetheless the Court's imprimatur of this RESTATEMENT provision carries considerable force.

Other United States courts, in line with the RESTATEMENT, have concluded that a corporation's nationality is determined by its state of incorporation. For example, in *Rong v. Liaoning Provincial Government*, 362 F. Supp. 2d 83 (D.D.C. 2005), *aff'd on other grounds*, 452 F.3d 883 (D.C. Cir. 2006), Broadsino, an entity incorporated in Hong Kong, claimed that its property was expropriated by China. Plaintiffs in *Rong* argued that Broadsino should not be determined to be a national of China based in part on the fact that there had previously been an agreement that Hong Kong corporations would be considered foreign nationals with respect to

---

[7] Plaintiffs' Opposition appears to only address *JPMorgan* in this footnote. According to their Table of Authorities, the case appears once on page 30, (Dkt. No. 39, at 5), but the Court sees no mention of the case there.

China. *See* 362 F. Supp. 2d at 101. Judge Walton rejected this argument and looked to the state of incorporation to determine nationality. "[B]ecause Broadsino is a corporation organized under the laws of Hong Kong, [China]'s actions did not contravene international law. . . [E]xpropriation by a sovereign state of the property of its own national does not implicate settled principles of international law." *Id.* at 101-02. And recently in *Best Medical Belgium, Inc. v. Kingdom of Belgium*, 913 F. Supp. 2d 230 (E.D. Va. 2012), an American company with "a controlling share" of a Belgian subsidiary challenged an alleged expropriation by the Belgian government. *Id.* at 234. The court in that case found no violation of international law, holding that the subsidiary was a Belgian national. *Id.* at 239-40.

On the other side of the ledger, so to speak, from the ICJ, ICSID, RESTATEMENT, U.S. Supreme Court, and other courts, Plaintiffs point to one case from the Second Circuit—Banco *Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962) (*Sabbatino*), *rev'd on other grounds*, 376 U.S. 398 (1964); *see also Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 168 (2d Cir. 1967) (a continuing part of the "much-discussed previous [*Sabbatino*] opinions"). There is no doubt *Sabbatino* is a useful case for Plaintiffs. In that case, the Second Circuit disregarded the nationality of the corporation where it was different from the nationality of most of the corporation's shareholders. 307 F.2d at 861. The court stated that "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only to the 'nationality' of the corporate fiction." *Id.*

Plaintiffs claim that *Sabbatino* is a "seminal" case. (Dkt. No. 39, at 33). However, if the case were truly seminal, it would have strongly influenced later developments, yet it appears that *Sabbatino's* proposition that a corporation's state of incorporation can be ignored has never been followed by any court in the United States. Plaintiffs point to none, and this Court has found none.

3. Conclusion

Although Plaintiffs are not without any support in arguing that H&P-V is not a national of Venezuela under international law, the holding of the Second Circuit in *Sabbatino* is overwhelmed by authorities including cases from the International Court of Justice, a Decision on Jurisdiction from the International Center for the Settlement of Investment Disputes, other decisions from U.S. courts, and treatises (including one endorsed by the Supreme Court). The weight of authority therefore leads to the conclusion that H&P-V is considered a national of Venezuela under international law.

B. Act of State doctrine

The second of the parties' Initial Issues is whether the act of state doctrine bars Plaintiffs' expropriation claims. As part of that inquiry, the Court must determine "whether this defense may be adjudicated prior to the resolution of Defendants' challenges to the Court's subject matter jurisdiction." (Dkt. No. 36, at 3). Because this Court must first determine it has jurisdiction before considering an act of state defense, the time is not yet ripe for resolving whether the act of state doctrine bars Plaintiffs' expropriation claims.

1. Background on the act of state doctrine

The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). This doctrine "is applicable when 'the relief sought or the defense interposed would require a court in the United States to declare invalid the official act of a foreign sovereign performed within' its boundaries." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (internal brackets omitted) (quoting *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990)). The doctrine is to be interpreted and applied in accordance with the policy interests of "international comity, respect for the sovereignty of other nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *W.S. Kirkpatrick*, 493 U.S. at 408; *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 477 n.7 (D.C. Cir. 2007). However, the party raising the defense bears the burden to affirmatively show that an act of state has occurred and "that no bar to the doctrine is applicable under the factual circumstances." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1534 (D.C. Cir. 1984) (en banc), *judgment vacated on other grounds*, 471 U.S. 1113 (1985).

The Second Hickenlooper Amendment is an exception to the act of state doctrine. *See* 22 U.S.C. § 2370(e)(2). Through this Amendment, Congress legislatively overruled *Sabbatino* so that the act of

state doctrine would not preclude adjudication of an expropriation claim where the court has jurisdiction to hear it. *See Nemariam*, 491 F.3d at 477 n.8 ("Through the Hickenlooper Amendment, 'Congress . . . adopted a specific statutory provision requiring federal courts to examine the merits of controversies involving expropriation claims. [It] overrides the judicially developed doctrine of act of state.') (quoting *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 829 (9th Cir. 1987)). Specifically, the Amendment bars application of the doctrine where there is: "[(1)] a claim of title or other right to property asserted by any party including a foreign state (or a party claiming through such state); [(2)] based upon (or traced through) a confiscation or other taking after January 1, 1959; [(3)] by an act of state in violation of the principles of international law . . ." 22 U.S.C. § 2370(e)(2).

2. Jurisdictional considerations

"Federal courts are courts of limited jurisdiction." *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (citation omitted). Jurisdiction is "the first and fundamental question" federal courts must ask when overseeing any case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Thus, there is a threshold duty vested in every court to resolve jurisdictional disputes prior to any ruling on the merits. *See Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999).

Because "there is no unyielding jurisdictional hierarchy," *Ruhrgas A.G. v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999), district courts have the discretion to resequence jurisdictional questions, *United States v. Johnson*, 254 F.3d 279, 287 n.11

(D.C. Cir. 2001); *see also Galvan*, 199 F.3d at 463 (resolving a sovereign immunity challenge before subject-matter jurisdiction, holding "[s]overeign immunity questions clearly belong among the non-merits decisions that courts may address even where subject-matter jurisdiction is uncertain [because] the Supreme Court has characterized the defense as jurisdictional") (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)); *cf. Ruhrgas AG*, 526 U.S. at 586 (expressly allowing adjudication of challenges to personal jurisdiction prior to subject-matter jurisdiction where "concerns of judicial economy and restraint are overriding").

In short, district courts cannot resolve a merits defense prior to resolving a challenge to subject-matter jurisdiction. *See Steel Co.*, 523 U.S. at 94.

3. Application of jurisdictional considerations to the act of state doctrine

The act of state doctrine goes to the merits, and is not a jurisdictional defense. *See Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits."). This Circuit has repeatedly recognized the act of state doctrine as a merits defense requiring prior resolution of jurisdictional questions. *See, e.g.*, *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 (D.C. Cir. 2002) ("[J]urisdiction must be resolved before applying the act of state doctrine, because that doctrine is 'a substantive rule of law.") (quoting *In re Papandreou*, 139 F.3d 247, 256 (D.C. Cir. 1998)) (footnote

omitted); *Marra v. Papandreou*, 216 F.3d 1119, 1122 (D.C. Cir. 2000) (reaffirming *In re Papandreou's* holding that while standing, personal jurisdiction, and forum non conveniens are jurisdictional issues, the act of state doctrine is not); *In re Papandreou*, 139 F.3d at 256 ("[W]e note that the Supreme Court has authoritatively classified the act of state doctrine as a substantive rule of law. Accordingly, resolution of the case on this ground, before addressing the FSIA jurisdictional issue, would exceed the district court's power.") (citations omitted). This Circuit's sequencing rule requires consideration of whether subject-matter jurisdiction exists under the FSIA before deciding whether to dismiss the case under the act of state doctrine. Therefore the determination of whether the act of state doctrine applies to the facts of this case must wait.

C. The Direct Effect test

The third of the Initial Issues is "[w]hether, for purposes of determining the applicability of the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), Plaintiffs have sufficiently alleged a 'direct effect' in the United States within the meaning of that provision." (*See* Dkt. No. 36 ¶ 1). The Circuits are divided on how direct a "direct effect" must be since the Supreme Court's only case interpreting the relevant FSIA language. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). But based on a review of the developments in this area, particularly in this Circuit, Plaintiffs have sufficiently stated a direct effect under the FSIA's commercial activities exception.

1. Standard of Review

As the Supreme Court has explained, "the FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The Act provides that foreign states are immune from the jurisdiction of both federal and state courts, subject to those specific exceptions embedded within the statute providing otherwise. *See* 28 U.S.C. §§ 1604-07. In a suit brought against a foreign state, a district court must decide, as a threshold question, whether any of the FSIA exceptions apply. *See Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1983).

Section 1605(a)(2) of the FSIA describes an exception to the presumption of foreign sovereign immunity where "the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Therefore, the parties' Joint Stipulation, requesting that the Court decide whether Plaintiffs have sufficiently alleged a direct effect in the United States, operates as an incremental and narrowly-tailored facial challenge to the Court's jurisdiction. Federal jurisdictional pleading standards apply accordingly. *See* FED R. CIV. P. 12(b)(1).

The same standards that apply to a Rule 12(b)(6) motion to dismiss apply where the defendant raises a facial challenge to the court's jurisdiction on the pleadings. *See Muscogee Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010) (construing defendants' challenge to jurisdiction as

facial and therefore "apply[ing] the same standards under Rule 12(b)(1) that are applicable to a Rule 12(b)(6) motion to dismiss for failure to state a cause of action."); *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) ("When a defendant makes a facial challenge to subject matter jurisdiction, the plaintiff, in effect, is afforded the same procedural protections as he would receive under a Rule 12(b)(6) consideration."); *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007) ("Pursuant to Rule 12(b)(1), the Court must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the nonmoving party.").

Applying a Rule 12(b)(6) level of review means "[a] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *Iqbal*'s plausibility determination is a "context-specific task" requiring a level of factual explication commensurate with the nature of the claim. *Id.* at 679. Rule 12(b)(1) motions in particular require "the plaintiff [to] assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right.' *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 244 (3d Cir. 2012) (quoting *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007)).

For an effect to be "direct" under the FSIA's commercial activities exception, Plaintiffs must adequately allege that the effect "follows as an

immediate consequence of the defendant's activity." *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (citation, internal quotations, and ellipses omitted); *see also Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). While jurisdiction may not be predicated on "purely trivial effects," the effect need not be substantial or foreseeable. *See Weltover*, 504 U.S. at 618; *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661, 664 (D.C. Cir. 2010) (citing *Princz*, 26 F.3d at 1172).

If Plaintiffs have alleged facts sufficient to fairly infer that Defendants "promised [and failed] to perform specific obligations in the United States," then the "direct effect" requirement is satisfied. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 600-01 (D.C. Cir. 2013) (citing *Weltover*, 504 U.S. at 619). Plaintiffs have alleged Defendants breached nine contracts concerning drilling in the eastern region of Venezuela, and one contract concerning drilling in western region, pursuant to which the PDVSA Defendants agreed to pay a portion of the contracts in U.S. Dollars. (*See* Dkt. No. 1 ¶ 118). Each of the ten contracts contained a provision related to whether and under what conditions payments made in U.S. Dollars would be sent to the Bank of Oklahoma in Tulsa, Oklahoma. (*See id.* ¶ 43).

A foreign state promising to perform specific obligations in the United States, and then breaking that promise, has a "direct effect" in the United States under FSIA, without regard to how important the place of that performance was to the parties or the agreement. *See de Csepel*, 714 F.3d at 600-01; *see also I.T. Consultants, Inc. v. Islamic Republic of*

Pakistan, 351 F.3d 1184, 1186 (D.C. Cir. 2003) ("[A] foreign sovereign's failure to make a contractually required deposit in a bank in the United States meets the statute's definition of a 'direct effect,' without regard to whether the parties considered the place of payment 'important,' 'critical,' or 'integral.'").

2. The contracts at issue in this litigation

Section 18.15 of the eastern drilling contracts provides:

> "PDVSA" agrees to pay in United States Dollars, the portion of the price of this CONTRACT set forth in such currency, under the following conditions:
>
> a) That the deposits made by PDVSA in the accounts previously identified or in any other accounts indicated by the CONTRACTOR will release PDVSA from its obligation to pay the portion of the price set in United States Dollars to the extent of the deposits made.
>
> b) PDVSA will always have the right, at any time and at its sole discretion, to pay the portion of the price set in United States Dollars, in that currency or in bolivars at the current rate of exchange in Caracas on the date of payment. In the event that the payment is made in Bolivars and the CONTRACTOR believes it has suffered losses as a consequence of the variation in the rate of exchange applied on the date of issue of the invoice and at the rate in force on the payment date thereof, the CONTRACTOR will submit the relevant claim according to

> the provisions of Clause 18.12 of this CONTRACT.

(Dkt. No. 40-1, at 22 (§ 18.15)).

The eastern drilling contracts were later supplemented by an Agreement on June 2, 2008 (the June 2, 2008 Agreement) whereby PDVSA agreed to "pay 61% of the invoices for services rendered in the eastern region in U.S. dollars to a foreign bank account designated by H&P-Venezuela and the remaining 39% of the invoices for such services in bolivars." (Dkt. No. 22-1, at 14; *see also* Dkt. No. 40-7, at 2 (7111-2)). The PDVSA Defendants stress paragraph five of the June 2, 2008 Agreement, claiming they had no obligation to make payments in the United States because they retained an option not to do so:

> Without prejudice to all that is indicated above, the present agreement of partial payment in foreign currency shall be without effect when PDVSA deems it discretionally convenient, in accordance with its interests and considering changes in its Policies and Internal Rules.

(Dkt. No. 40-7, at 2 (¶ 5)).

Once PDVSA received an invoice from H&P-V, PDVSA had 30 days to dispute a line item before payment was due. (Dkt. No. 40-1, at 21 (§ 18.4); *see also* Dkt. No. 1, ¶ 45). The eastern region contract also reads that "in the event that PDVSA, for any reason, has not made the payments within this thirty (30) day term, the parties agree that this does not entitle them to legal actions against the other party." (Dkt. No. 40-1, at 21 (§ 18.4)). Nonetheless, until 2010, Defendants approved many invoices

requiring payment in U.S. Dollars to the Tulsa, Oklahoma bank account, pursuant to the June 2, 2008 Agreement. (*See* Dkt. No. 1, ¶ 44). In all, there were approximately 55 payments totaling $65 million to the Oklahoma bank account during the time period relevant to this litigation. (*See id.*).

Under the western drilling contract, payment was to be made in bolivars unless the foreign exchange control measures in Venezuela prevented H&P-V from exchanging local currency for U.S. Dollars, as necessary to meet U.S. Dollar obligations outside of Venezuela:

> If as a result of the exchange control measures established by the competent authorities, [H&P-V] is unable to obtain in a timely fashion the foreign currency required to perform its obligations abroad related to the performance of this CONTRACT, [Petróleo] agrees to pay in United States dollars the portion of the price of this CONTRACT set in said currency in accordance with current regulation, "Norms and Procedures for the Payment of Foreign Exchange for Construction, Goods and Services in the Western Division," for those items directly associated with the external component pursuant to the results of the corresponding audit. [H&P-V] shall indicate, for purposes of payment, the bank and account number where payments are to be made.

(Dkt. No. 40-3, at 21 (§ 18.14)).

In addition to the provisions regarding payment, particularly relevant to the direct effects analysis are

the contractual provisions requiring the procurement by H&P-V of products from American companies. For example, H&P-V had to buy transformers from a company in Fremont, Ohio (*see* Dkt. No. 40-1, at 37; Dkt. No. 39, at 64); equipment used with blowout preventers to space equipment apart from a company in Stephenville, Texas (*see* Dkt. No. 40-1, at 38; Dkt. No. 39, at 64); a top drive from a company in Erie, Pennsylvania (*see* Dkt. No. 40-6, at 36; Dkt. No. 39, at 64); a blow out preventer from a company in Houston, Texas (*see* Dkt. No. 40-6, at 42; Dkt. No. 39, at 64); hardbanding from a different company in Houston, Texas (*see* Dkt. No. 40-4, at 38; Dkt. No. 39, at 64); flanged fittings from a company in Willison, Florida (*see* Dkt. No. 40-4, at 41; Dkt. No. 39, at 64); a forklift from a company in Peoria, Illinois (*see* Dkt. No. 40-6, at 44; Dkt. No. 39, at 64); and various products from a third company in Houston, Texas (*see, e.g.*, Dkt. No. 40-3, at 35; Dkt. No. 39, at 64). (*See also* Dkt. No. 1, ¶ 124 ("H&P-V routinely entered into third-party agreements with vendors, suppliers, and services companies in the United States, for the purpose of delivering goods and services from the United States to Venezuela to permit H&P-V to perform its contracts with the PDVSA Defendants.").

3. Direct effect regarding payments to United States

The Supreme Court has addressed the meaning of "direct effect" in the context of the FSIA's commercial activities exception only once. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). In *Weltover*, the government of Argentina issued a Presidential Decree to extend the time it had to pay

certain bonds. Certain entities "refused to accept the rescheduling and insisted on full payment, specifying New York as the place where payment should be made." *Id.* at 610. As to the "direct effect" component of 28 U.S.C. § 1605(a)(2), the Court rejected the suggestion that there is a "substantiality" or "foreseeability" requirement, and stated that "an effect is direct if it follows as an immediate consequence of the defendant's activity." 504 U.S. at 618 (citation, quotation marks, and ellipses omitted). It then found a direct effect with "little difficulty" because the entities challenging Argentina "had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. . . . Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 618-19.

Two years after *Weltover*, the D.C. Circuit decided *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994). In *Rafidain*, two Irish corporations sought to recover payments on letters of credit from banks that were part of the Iraqi government. Previously, the banks had made installment payments on the letters "mostly from accounts in United States banks." *Id.* at 1144. The *Rafidain* court distinguished *Weltover* because "[n]either New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have been paid . . . . Rafidain might well have paid them from funds in United States banks but it might just as well have done so from accounts located outside of the United States, as it had apparently done before." *Id.* at

1146-47 (footnote omitted). Even where there was no "'immediate consequence' in the United States from Rafidain's failure to honor the letters," the Court still found a "direct effect" in the United States under § 1605(a)(2). *Id.* Interesting to note about *Rafidain* is Judge Wald's concurrence, where she "emphasize[d] that, for an act to have a 'direct effect' in the United States, there is no prerequisite that the United States be contractually designated as the place of performance. . [E]ven absent a contractual provision mandating the involvement of U.S. banks, if the longstanding consistent customary practice between Rafidain and Goodman had been for Rafidain to pay Goodman from its New York accounts, the breach of the letters of credit might well have had a direct and immediate consequence in the United States." *Id.* at 1147 (Wald, J., concurring).

As a result of *Weltover*, Judge Wald's concurrence in *Rafidain*, and other cases, Judges on the District Court for the District of Columbia have found that our Court of Appeals has "left open the possibility that a court could find a 'direct effect' based upon a non-express agreement to pay in the United States." *Idas Resources N.V. v. Empresa Nacional de Diamantes de Angola E.P.*, 2006 WL 3060017, at *9 (D.D.C. Oct. 26, 2006) (Huvelle, J.) (quoting *Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108, 114 (D.D.C. 2003) (Kennedy, J.)); *see also Agrocomplect, AD v. Republic of Iraq*, 524 F. Supp. 2d 16 (D.D.C. 2007) (Walton, J.) ("[T]his court need not consider whether it is necessary for parties to enter into an agreement designating a place for payment or vesting one party with complete discretion to name a place for payment contemporaneously with a

contract giving rise to a breach of contract suit . . . ."); *cf. Cruise Connections*, 600 F.3d at 666 (stating "we have no need to consider . . . whether a foreign sovereign had to have agreed to the use of a U.S. bank account," and distinguishing cases that addressed the issue in part because "none of those cases dealt with a situation like the one we face here: where the alleged breach resulted in the direct loss of millions of dollars worth of business in the United States.") But whether or not Defendants' pattern and practice of making numerous payments totaling millions of dollars to a bank in the United States constitutes a direct effect that trumps Defendants' contractual discretion to pay Plaintiffs in Venezuela in Bolivars is not necessary for this Court to decide. There is a direct effect based on third-party impacts under the contracts based on D.C. Circuit precedent.

4. Direct effect regarding third party impacts

In *Cruise Connections Charter Management 1, LP v. Attorney General of Canada*, the D.C. Circuit indicated a broad view of the direct effect test. *See* 600 F.3d 661 (D.C. Cir. 2010). In *Cruise Connections*, the Royal Canadian Mounted Police (RCMP) cancelled a contract with the American company Cruise Connections to provide cruise ship services during the 2010 Olympics. The company had subcontracted with two U.S.-based cruise lines, Holland America and Royal Caribbean. The district court found that the defendant enjoyed sovereign immunity in part because "Cruise Connections' inability to perform its contractual obligations to the third party cruise lines constituted an intervening element between RCMP's breach and the broken

third-party agreements." 600 F.3d at 664 (citation and quotation marks omitted). The D.C. Circuit reversed, finding not only that "the alleged breach resulted in the direct loss of millions of dollars worth of business in the United States," but that the "direct effect" need not necessarily harm the plaintiff. *Id.* at 666. The FSIA "requires only that the effect be 'direct,' not that the foreign sovereign agree that the effect would occur." *Id.* at 665 (citation omitted).[8]

Plaintiffs here allege an impact of the breach that is sufficiently similar to the breach found to have a direct effect in *Cruise Connections*. In *Cruise Connections*, the contract itself required the ships to come from U.S.-based companies. Relying on this fact, the D.C. Circuit found that "RCMP's termination of the Cruise Connections contract led inexorably to the loss of revenues under the third-party agreements. This is sufficient." *Id.* The material before this Court indicates that Defendants agreed to contracts with Plaintiffs that required the purchase and use of specific parts from specific U.S.-based companies. The D.C. Circuit has previously indicated that such a finding is sufficient for a finding of direct effect. Accordingly, there is a direct effect here under the meaning of § 1605(a)(2).

This accords with the D.C. Circuit's recent interpretation of *Weltover*. In *Weltover*, the Supreme Court stated: "Money that was supposed to have

---

[8] Cruise Connections also claimed that lost revenue expected from on-board purchases by security personnel staying on the ships constituted a direct effect, but the D.C. Circuit found it "need not decide whether non-payment of on-board revenues qualifies as a direct effect" because it found a direct effect through other factors.

been *delivered* to a New York bank for deposit was not forthcoming." 504 U.S. at 619 (emphasis added). In *Cruise Connections*, the D.C. Circuit extended this language, finding that "[b]ecause RCMP terminated the contract, revenues that would otherwise have been *generated* in the United States were 'not forthcoming.' 600 F.3d at 665 (emphasis added). The D.C. Circuit's interpretation of *Weltover*, binding on this Court, indicates that the third party contracts at issue here, the breach of which allegedly resulted in the loss of "revenues that would otherwise have been generated in the United States," have a direct effect as that term is used in the FSIA.

5. Plaintiffs' motion to enforce

Because the issue of whether this Court can exercise personal jurisdiction over the PDVSA Defendants consistent with constitutional due process is not clearly encompassed within the Initial Issues, the question will not be answered at this time. The Joint Stipulation was forged in part to postpone any obligations by Defendants to respond to Plaintiffs' discovery requests. Yet to resolve the question of constitutional due process in this case, discovery would likely be necessary. The parties came to an agreement to avoid discovery regarding the Initial Issues, and therefore deciding this issue without permitting any discovery would conflict with precedent from the D.C. Circuit. *See El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) ("A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum.").

In addition, the PDVSA Defendants both indicated that the issues of statutory direct effect under the FSIA and constitutional due process, while related, are distinct, and also acknowledged that there are elements of the analysis of constitutional due process that are tied up with issues explicitly denoted as Additional Issues. As to the former point, the PDVSA Defendants indicated in their motion to dismiss that the statutory and constitutional issues are distinct. (*See* Dkt. No. 22-1, at 32). In their reply the PDVSA again indicated the issues are, though related, distinct. (*See* Dkt. No. 43, at 31 ("[N]ot only does H&P-Venezuela fail to satisfy the direct effect requirement of the FSIA, but the assertion of jurisdiction would *also* violate the due process protections to which the PDVSA Defendants are entitled." (emphasis added; citation omitted)). While the PDVSA Defendants argue that Plaintiffs have conceded the due process issue because the issue was raised in the PDVSA Defendants' motion to dismiss and not responded to, (*see* Dkt. No. 43, at 31 n.24), this argument fails to persuade. Defendants made a number of arguments in their motions to dismiss that went unaddressed by Plaintiffs because of the Joint Stipulation. Constitutional due process is among them, and was not simply conceded.

As to the latter point, Defendants describe the constitutional argument as inextricably bound with issues that are clearly articulated as Additional Issues. (*See* Dkt. No. 43, at 10 and n.2 (stating that an assertion of jurisdiction would violate due process in part because the contracts "were negotiated and performed entirely in Venezuela [and] governed by Venezuelan law with a Venezuelan forum-selection

clause," and arguing that this issue, clearly enumerated as an Additional Issue, should nonetheless "inform this Court's determination of whether it would be reasonable to assert jurisdiction commensurate with due process"); *id.* at 32 (referencing the alleged forum selection clauses again when arguing that "jurisdiction over the PDVSA Defendants would not comport with due process" (citation omitted))).

There are yet still other reasons why the constitutional due process argument should not be considered as part of the Initial Issues. For example, the D.C. Circuit has stated that "[t]he statutory requirements for personal jurisdiction do not affect the constitutional in personam jurisdiction requirement that, pursuant to the due process clause of the Fifth Amendment, certain 'minimum contacts' must exist between the person and the jurisdiction." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 442 n.10 (D.C. Cir. 1990). Because the D.C. Circuit has previously separated the statutory and constitutional questions, because of the need for additional discovery, because of the way the issue was briefed by the PDVSA Defendants, and fundamentally because of the language of the Joint Stipulation, this Court finds that deciding the constitutional due process argument is not proper as part of the Initial Issues.

D. Standing of H&P-IDC

Standing jurisprudence springs from two sources: Article III's case-or-controversy requirement, and judicially self-imposed, prudential limitations. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). To establish constitutional standing, a

plaintiff must demonstrate that it has suffered a concrete and particularized injury in fact, fairly traceable to the defendant's unlawful conduct, and show that the wrong is likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants do not challenge whether Article III's case-or-controversy requirements have been met, but only assert their challenge under the shareholder standing rule. (*See* Dkt. No. 22-1 at 18-20); (Dkt. No. 43 at 10-12); (Dkt. No. 44 at 29-31); *cf.* (Dkt. No. 36, at 2-3) (clarifying that the Initial Issues are derived from Defendants' motions to dismiss).

Plaintiffs concede that H&P-IDC does not have standing regarding the breach of contract claims. (Dkt. No. 39, n.26) ("Plaintiffs do not contend that H&P-IDC has standing to bring the breach of contract claims."). The only issue regarding standing, then, is whether the company has standing regarding the expropriation claim.

Plaintiffs have alleged that H&P-IDC "suffered the expropriation of an entire company without compensation," (Dkt. No. 1, ¶ 85), and that "Venezuela's expropriation of the rigs deprived H&P-IDC of its ownership and control of H&P-V depriv[ing] H&P-IDC of its subsidiary and its business as a going concern, directly impacting the operations and bottom line of H&P-IDC," (*id.* ¶ 139). Plaintiffs have not only alleged that Venezuela took H&P-V's real and personal property, but that "[t]he seizure constituted a taking of the entirety of H&P's Venezuelan business operations . . ." (*Id.* ¶ 75). Plaintiffs aver that "Defendants took the entire business, which they now operate as a state-owned commercial enterprise," and as a result "H&P no

longer . . . maintains any commercial operations in Venezuela," (*Id.* ¶¶ 81, 85).

Defendants argue that, because H&P-IDC is not a party to any of the contracts at issue, they lack standing to bring a claim. As the PDVSA Defendants argue in their Reply, "H&P-IDC's standing argument has no merit. It has not, and cannot, cite a single case in which a court has permitted a shareholder to assert an injury to its corporation, as opposed to an injury to itself, when the corporation is able and willing to assert its own rights." (Dkt. No. 43, at 8).

Particularly relevant here is the prudential restriction regarding standing referred to as the shareholder standing rule. *See Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990). As the Supreme Court has said, this equitable rule "prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Id.; see also Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873, n.14 (D.C. Cir. 1984) ("No shareholder—not even a sole shareholder—has standing in the usual case to bring suit in his individual capacity on a claim that belongs to the corporation."). "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). And, indeed, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Id.* However, shareholders may still bring an action to enforce their own individual rights, "even where the

corporation's rights are also implicated." *Franchise Tax Board*, 493 U.S. at 336. Therefore, standing for the plaintiff-shareholder depends on whether the shareholder's claim derives from the rights of the corporation or from a "direct, personal interest in [the] cause of action . . . ." *Id.*

According to the PDVSA Defendants, the shareholder standing "rule 'prohibits shareholders from initiating actions to enforce the rights of the corporation'" (Dkt. No. 22-1, at 18 (quoting *Franchise Tax Bd.*, 493 U.S. at 336)). But the word before that quote from *Franchise Tax Bd.* and omitted by the PDVSA Defendants is important: "generally." The sentence following the quote is instructive as well: "There is, however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Franchise Tax Bd.*, 493 U.S. at 336.

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003), also relied upon by Defendants, does not directly address this issue. As is relevant here, in *Dole Food* the Supreme Court addressed a specific question, namely "whether a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary." 538 U.S. at 471. The Court answered no to that question, and it also noted that "[t]he veil separating corporations and their shareholders may be pierced in some circumstances . . . ." 538 U.S. at 475. Thus, *Dole Food* is not directly on point, nor does it suggest that Plaintiffs' standing argument in this case is foreclosed.

In *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), the D.C. Circuit rejected an argument similar to the one offered here by Defendants regarding the standing of H&P-IDC. However, although the case supports Plaintiffs' argument about H&P-IDC's standing, it has a procedural history that Defendants suggest undercuts its precedential value. But considered together, the case and the developments that followed it suggest that Plaintiffs have the better argument.

In *Ramirez*, U.S. citizen Temistocles Ramirez de Arellano (Ramirez) was the sole shareholder of two U.S. corporations, which in turn wholly owned four subsidiaries incorporated in Honduras. Through this "chain of title," Ramirez owned "a large agricultural-industrial complex in the northern region of Honduras." 745 F.2d at 1506. The U.S. Department of Defense (DoD) seized "over half of the ranch's 14,000 acres and nearly 90% of the year-round grazing land," and the DoD's operations helped to "destroy[] the plaintiffs' investment and Ramirez's life's work." 745 F.2d at 1508. Ramirez brought an action requesting declaratory and injunctive relief for the occupation and destruction of his property and for the deprivation of property without due process. The DoD raised a standing argument very similar to the one raised by Defendants in this case, and the D.C. Circuit rejected it. The *Ramirez* majority called the standing objection "a most extreme form of fanciful thinking. It is bizarre to posit that the claimed seizure and destruction of the United States plaintiffs' multi-million dollar investment, businesses, property, assets, and land is not an injury to a protected property interest."

745 F.2d at 1515. *See also id.* at 1518 ("The fact that the United States plaintiffs do not directly hold legal title to the real property does not deprive them of a property interest in the assets nor does it defeat their constitutional claims. Ramirez has a protected property interest in the allegedly occupied property both by virtue of his status as sole shareholder of the corporation and by virtue of his possession of the land for more than twenty years.").

It is true that after the 1984 *Ramirez* decision, the Supreme Court vacated it. *See* 471 U.S. 1113 (1985). The Supreme Court's one paragraph decision vacated and remanded for reconsideration in light of legislation enacted after the D.C. Circuit issued its 1984 opinion. On remand, the Circuit did not address the standing issue, but did dismiss the case without prejudice "so as not to bar reinstatement of the suit in the event the challenged activity resumes." *See* 788 F.2d 762, 764 (D.C. Cir. 1986). Although a decision vacated by the Supreme Court does not have precedential value when vacated because of disagreement with the ruling, *see Al Odah v. United States*, 321 F.3d 1134, 1143 (D.C. Cir. 2003), such is not the case here.[9] The Supreme Court did not address *Ramirez's* discussion of standing. However, while the case is helpful to Plaintiffs, its value is somewhat obscured by subsequent developments. Other cases, however, further the argument for H&P-IDC's standing.

---

[9] The 1984 *Ramirez* decision continues to be cited approvingly by the D.C. Circuit, as well as other courts. *See, e.g., Transohio Say. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992); *Munns v. Clinton*, 822 F. Supp. 2d 1048 (E.D. Cal. 2011).

The D.C. Circuit later recognized that a plaintiff could have standing for purposes of the FSIA expropriation exception under circumstances similar to those at issue here. *See Nemariam*, 491 F.3d 470. In *Nemariam*, the D.C. Circuit addressed the reasoning of the court in *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F. Supp. 600 (W.D. Mich. 1985). In its discussion of that case, the D.C. Circuit approvingly cited that court's holding that "the seizure of the controlling stockholder's interest in a corporation, triggered the [FSIA's] expropriation exception." *See Nemariam*, 491 F.3d at 478. The D.C. Circuit endorsed the *Kalamazoo* court's reasoning that "a controlling interest in the corporation's stock was no different from the corporation's physical assets under section 1605(a)(3) because '[i]n either case, the foreign state has expropriated control of the assets and profits of the corporation.'" *Nemariam*, 491 F.3d at 478 (quoting *Kalamazoo*, 616 F. Supp. at 663) (footnote omitted).

The Ninth Circuit has also come to the same conclusion regarding standing with respect to the FSIA expropriation exception. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). In *Siderman*, the plaintiffs brought an action claiming, among other things, that the Argentine military had unlawfully expropriated an Argentine corporation that was owned by four people, three with a 33% share each and a fourth with a 1% share. *See* 965 F.2d at 703. The corporation's "assets comprised numerous real estate holdings including a large hotel in [Argentina]." 965 F.2d at 703. One plaintiff in *Siderman* was a U.S. citizen who owned a 33% share, and the Ninth

Circuit found that she had asserted a "substantial and non-frivolous" claim that her "property had been taken in violation of international law," and thus she had standing "to invoke the international takings exception." 965 F.2d at 711-12. This parallels Plaintiffs' allegations in this case, whereby the Venezuelan military seized H&P-V by physically taking its assets.[10] The *Siderman* holding suggests H&P-IDC's standing argument is even stronger, as H&P-IDC is the full owner of H&P-V, as opposed to the 33% owner as in *Siderman*.

It is generally maintained that "[t]he shareholders' essential right is to share in the profits and in the distribution of assets on liquidation in proportion to their interest in the enterprise." 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 7:2 (3d ed. 2012). Thus, the complete physical seizure of a parent company's wholly-owned subsidiary, to the point of eliminating the corporation entirely (or comprehensively taking its assets and profits), deprives the parent shareholder of its "essential" and unique rights, giving rise to claims that would not belong to the corporation. Plaintiffs have alleged that Venezuela completely expropriated all the physical property of H&P-V, such that H&P-IDC no longer has commercial operations in Venezuela. Construing Plaintiffs' allegations favorably, Defendants' actions

---

[10] To the extent the PDVSA Defendants are trying to distinguish between the taking of corporate assets and the taking of a corporation, the parties have stipulated that the Court is to presume the truth of well-pleaded allegations in the complaint, and Plaintiffs have alleged more than the taking of a few corporate assets—they have alleged the taking of the entire corporation. (*See* Dkt. No. 1, ¶ 85).

have deprived H&P-IDC, individually, of its essential and unique rights as sole shareholder of H&P-V by dismantling its voting power, destroying its ownership, and frustrating its control over the company. Thus, H&P-IDC has "a direct, personal interest" in the complete taking of its wholly owned subsidiary, and has standing to bring its wrongful expropriation claim.[11]

CONCLUSION

To summarize, the Court finds that H&P-V is a national of Venezuela under international law, H&P-IDC has standing to pursue the expropriation claim, Plaintiffs have sufficiently alleged a direct effect under 28 U.S.C. § 1605(a)(2), and the time is not yet ripe for a decision on whether the act of state doctrine bars Plaintiffs' expropriation claims. In addition, the issue of constitutional due process is not among the four Initial Issues, and therefore is not addressed as part of this Memorandum Opinion. Based on the foregoing analysis and the parties'

---

[11] International custom has also recognized that shareholders have certain direct and individual rights in these kinds of expropriation claims:

> It is well known that there are rights which municipal law confers upon the [shareholder] distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties.

Barcelona Traction 1970 I.C.J. at 36. Plaintiffs have listed a number of additional sources for this practice in international law. (*See* Dkt. No. 39, at 43 n.25).

Joint Stipulation, there will now be "a second phase of briefing on the motions to dismiss." (Dkt. No. 36, at 3).

Accordingly, Defendants' Motions to Dismiss (Dkt. Nos. 22, 23, and 24) are TEMPORARILY GRANTED IN PART and DENIED IN PART, and Plaintiffs Motion to Enforce (Dkt. No. 45) is GRANTED.

Date: September 20, 2013

/s/ Robert L. Wilkins
ROBERT L. WILKINS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7169

HELMERICH & PAYNE INTERNATIONAL DRILLING CO. and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Appellees,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

Appellee,

PETRÓLEOS DE VENEZUELA, S.A. and PDVSA PETRÓLEO, S.A.,

Appellants.

Argued January 16, 2015
Decided May 1, 2015
Consolidated with 13-7170, 14-7008

Appeals from the United States District Court
for the District of Columbia
(No. 1:11-cv-01735)

Before: GARLAND, *Chief Judge*, TATEL, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* SENTELLE

TATEL, *Circuit Judge:* The Foreign Sovereign Immunities Act (FSIA) grants foreign states immunity from suit in American courts unless one of several enumerated exceptions applies. In this case, after Venezuela forcibly seized oil rigs belonging to the Venezuelan subsidiary of an American corporation, both the parent and the subsidiary filed suit in the United States asserting jurisdiction under the FSIA's expropriation and commercial activity exceptions. Venezuela moved to dismiss on the ground that neither exception applies. The district court granted the motion as to the subsidiary's expropriation claim, but denied it in all other respects. For the reasons set forth in this opinion, we affirm in part and reverse in part. We agree with the district court that the parent corporation had sufficient rights in its subsidiary's property to support its expropriation claim. But because the subsidiary's expropriation claim is neither "wholly insubstantial" nor "frivolous"—this Circuit's standard for surviving a motion to dismiss in an FSIA case—the district court should have allowed that claim to proceed. And given that the subsidiary's commercial activity had no "direct effect" in the United States, which the FSIA requires to defeat foreign sovereign immunity, the district court should have granted the motion to dismiss with respect to that claim.

I

For more than half a century, Oklahoma-based Helmerich & Payne International Drilling Co. (H&P-IDC) successfully operated an oil-drilling business in Venezuela through a series of subsidiaries. Incorporated under Venezuelan law, the most recent

subsidiary, Helmerich & Payne de Venezuela (H&P-V), provided drilling services for the Venezuelan government. Having nationalized its oil industry in the mid-70s, Venezuela now controls exploration, production, and exportation of oil through two state-owned corporations: Petróleos de Venezuela, S.A. (PDVSA) and PDVSA Petróleo, known collectively as PDVSA. From its creation in 1975 through 2010, PDVSA depended on H&P-V's highly valuable and rare drilling rigs because they were capable of reaching depths of more than four miles. Those rigs were originally purchased by H&P-IDC and then transferred to its subsidiary H&P-V. At issue here are ten contracts executed in 2007 between H&P-V and PDVSA, each involving one of these rigs—nine in Venezuela's eastern region and one in the west. The contracts initially covered periods ranging from five months to one year, though all were subsequently extended.

Soon after signing the contracts, PDVSA fell substantially behind in its payments. By August 2008, unpaid invoices totaled $63 million. PDVSA never denied its contractual debt; quite to the contrary, it repeatedly reassured H&P-V that payment would be forthcoming. But no payments were made, and after overdue receivables topped $100 million, H&P-V announced in January 2009 that it would not renew the contracts absent "an improvement in receivable collections." Compl. ¶ 50 (internal quotation marks omitted). By November of that year, H&P-V had fulfilled all of its contractual obligations, disassembled its drilling rigs, and stacked the equipment in its yards pending payment by PDVSA.

PDVSA made no further payments. Instead, on June 12, 2010, PDVSA employees, assisted by armed soldiers of the Venezuelan National Guard, blockaded H&P-V's premises in western Venezuela, and then did the same to the company's eastern properties on June 13 and 14. PDVSA acknowledged that it erected the blockade to "prevent H&P-V from removing its rigs and other assets from its premises, and to force H&P-V to negotiate new contract terms immediately." *Id.* ¶ 63.

In the wake of the blockade, PDVSA issued a series of press releases that are central to H&P-V's expropriation claim. The first, issued on June 23, stated that "[t]he Bolivarian Government, through [PDVSA had] nationalized 11 drilling rigs belonging to the company Helmerich & Payne[], a U.S. transnational firm." *Id.* ¶ 65. A second press release, dated June 25, declared that PDVSA's "workers are guarding the drills" and that:

> The nationalization of the oil production drilling rigs from the American contractor H&P not only will result in an increase of oil and gas production in the country, but also in the release of more than 600 workers and the increase of new sources of direct and indirect employment in the hydrocarbon sector.

Id. ¶ 66. The June 25 release also "emphatically reject[ed] statements made by spokesmen of the American empire—traced [*sic*] in our country by means of the oligarchy." *Id.* ¶ 108 (alterations in original). Another press release, this one undated, stated that the nationalization would "guarantee that the drills will be operated by PDVSA as a company of all Venezuelans, . ensur[ing] the rights

of former employees of H&P, who a year ago were exploited and then dismissed by this American company, but now they will become part of PDVSA." *Id.* ¶ 109.

On June 29, more than two weeks after the blockade began, the Venezuelan National Assembly issued an official "Bill of Agreement" declaring H&P-V's property to be "of public benefit and good" and recommending that then-President Hugo Chávez promulgate a Decree of Expropriation. *Id.* ¶ 4. President Chávez issued the decree, which emphasized that "the availability of drilling equipment [such as H&P-V's] is very low both in the country and at world level, and the lack thereof would affect [Venezuela's national oil drilling] Plan." *Id.* ¶¶ 4, 19 (alterations in original). The decree directed PDVSA to take "forcible" possession of H&P-V's drilling rigs and other property. *Id.* ¶ 4. In response, PDVSA, having already taken possession of the property, issued a press release on July 2, which stated that H&P-V's rigs "are specialized drills we need for more complex sites" and "will be very useful." *Id.* ¶ 20.

That same day, Jesus Graterol, president of the Venezuelan National Assembly's Committee on Energy and Mines, criticized opponents of the nationalization for acting "in accordance with the instructions of the [U.S.] Department of State" and trying to "subsidize the big business transnational corporations, so that they can promote what they know best to do, which is war . . . through the large military industry[] of the Empire and its allies." *Id.* ¶ 105 (first alteration in original). Rafael Ramírez, Venezuela's Minister of Energy and Petroleum and

PDVSA's President, led a political rally at H&P-V's eastern site and declared:

> The company Helmerich & Payne has operated in our country for many years. Today, the Revolutionary Government took control over that company. You have been here guarding assets that now belong to the Venezuelan State. I acknowledge and appreciate your constant watch in order to protect the people's interests. Revolutionary salutation: Socialist Nation or Death. We shall be victorious!

Id. ¶ 5 (ellipses omitted). Ramírez also referred to H&P-V as an "American company" with "foreign gentlemen investors" and Venezuelan workers who would now "become part of [PDVSA's] payroll." *Id.* As Ramírez predicted, PDVSA now uses H&P-V's rigs and other assets in its state-owned drilling business.

Supposedly to compensate H&P-V for the expropriated property, PDVSA filed two eminent domain actions in Venezuelan courts. H&P-V has yet to receive service of process in the first proceeding, and the second has been stayed indefinitely. Believing that these proceedings are unlikely to result in adequate relief, H&P-V and its American parent, H&P-IDC, filed a two-count complaint under the FSIA in the United States District Court for the District of Columbia. The first count, brought against PDVSA and Venezuela, alleges a taking of property in violation of international law and asserts jurisdiction under the FSIA's expropriation exception. The second count, brought only against PDVSA, alleges breach of the

ten drilling contracts and asserts jurisdiction under the statute's commercial activity exception.

Venezuela and PDVSA moved to dismiss on the grounds that neither FSIA exception applies and that the act-of-state doctrine, under which American courts "will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders," *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004), bars the suit altogether. Before the district court could decide this motion, the parties filed a joint stipulation in which they agreed to brief four threshold issues:

1. Whether, for purposes of determining if a "taking in violation of international law" has occurred under the FSIA's expropriation exception, H&P-V is a national of Venezuela under international law;
2. Whether H&P-IDC has standing to assert a taking in violation of international law on the basis of Venezuela's expropriation of H&P-V's property;
3. Whether plaintiffs' expropriation claims are barred by the act-of-state doctrine, including whether this defense may be adjudicated prior to resolution of Venezuela's challenges to the court's subject matter jurisdiction; and
4. Whether, for purposes of determining the applicability of the FSIA's commercial activity exception, plaintiffs have sufficiently alleged a "direct effect" in the United States within the meaning of that provision.

The district court resolved the first question in Venezuela's favor but sided with Helmerich & Payne

on the other three. Venezuela and PDVSA now appeal, reiterating arguments they made in the district court. H&P-V cross-appeals on the first question. We review de novo a district court's resolution of a motion to dismiss for lack of jurisdiction under the FSIA. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 597 (D.C. Cir. 2013). Critically, moreover, "we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor." *Id.* (internal quotation marks omitted).

II

The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992). The Act provides that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. § 1604 (emphasis added), unless one of several exceptions applies, *id.* §§ 1605-07. H&P-V and H&P-IDC invoke the expropriation exception for their takings claim. H&P-V invokes the commercial activity exception for its breach of contract claim. We address each in turn.

Expropriation Exception

This exception, contained in FSIA section 1605(a)(3), denies foreign sovereign immunity "in any case . . . in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). According to Venezuela, the exception is inapplicable here for two reasons. First, as a

Venezuelan national, H&P-V may not claim a taking in violation of *international* law. Second, under generally applicable corporate law principles, H&P-IDC has no "rights in property" belonging to its subsidiary and thus lacks standing.

In deciding a motion to dismiss for lack of jurisdiction, we are mindful of the distinction between jurisdiction—a court's constitutional or statutory power to decide a case—and ultimate success on the merits. As the Supreme Court has explained, "[j]urisdiction . . . is not defeated . . . by the possibility that the averments [in a complaint] might fail to state a cause of action on which petitioners could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). What plaintiffs must allege to survive a jurisdictional challenge, then, "is obviously far less demanding than what would be required for the plaintiffs case to survive a summary judgment motion" or a trial on the merits. *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008). In an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a "taking in violation of international law" or has no "rights in property . . . in issue" *only* if the claims are "wholly insubstantial or frivolous." *Id.* at 943. A claim fails to meet this exceptionally low bar if prior judicial decisions "inescapably render the claim[] frivolous" and "completely devoid of merit." *Hagans v. Lavine*, 415 U.S. 528, 538, 543 (1974). "[P]revious decisions that merely render claims of doubtful or questionable merit do not render them insubstantial" for jurisdictional purposes. *Id.* at 538. Applying this standard to the present case, and viewing the complaint "in the light most favorable to the

plaintiff," *Sachs v. Bose*, 201 F.2d 210, 210 (D.C. Cir. 1952), we first consider whether H&P-V has asserted a non-frivolous international expropriation claim and then ask whether H&P-IDC has "put its rights in property in issue in a non-frivolous way," *Chabad*, 528 F.3d at 941.

As to the first inquiry, the parties begin on common ground. All agree that for purposes of international law, "a corporation has the nationality of the state under the laws of which the corporation is organized," Restatement (Third) of Foreign Relations Law § 213 (1987), and that generally, a foreign sovereign's expropriation of its own national's property does not violate international law, *United States v. Belmont*, 301 U.S. 324, 332 (1937). The Supreme Court has summarized the latter principle, known as the "domestic takings rule," this way: "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled." *Id.*

According to Venezuela, the domestic takings rule ends this case because H&P-V, as a Venezuelan national, may not seek redress in an American court for wrongs suffered in its home country. This argument has a good deal of appeal. Having freely chosen to incorporate under Venezuelan law, H&P-V operated in that country for many years and reaped the benefits of its choice, including several extremely lucrative contracts with the Venezuelan government. Given this, and especially given that H&P-V expressly agreed that these contracts would be governed by Venezuelan law in Venezuelan courts,

one might conclude that H&P-V should live with the consequences of its bargain.

According to H&P-V, however, this case is not so simple. It argues that Venezuela has unreasonably discriminated against it on the basis of its sole shareholder's nationality, thus implicating an exception to the domestic takings rule. In support, H&P-V cites *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), in which the Second Circuit determined that the Cuban government's expropriation of a Cuban corporation's property qualified as a taking in violation of international law. More than 90% of the Cuban corporation's shares were owned by Americans, and the official expropriation decree "clearly indicated that the property was seized because [the corporation] was owned and controlled by Americans." *Id.* This, the Second Circuit held, justified disregarding the domestic takings rule: "When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for [the court] in passing on the validity of that treatment to look only to the nationality of the corporate fiction." *Id.* (internal quotation marks omitted). Although the Supreme Court vacated this decision on other grounds, the Second Circuit later reiterated "with emphasis" its decision to disregard the domestic takings rule in the face of Cuba's anti-American discrimination. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 185 (2d Cir. 1967).

H&P-V also relies on the most recent Restatement of Foreign Relations Law, which recognizes discriminatory takings as a violation of international law. Specifically, section 712 suggests that "a program of taking that singles out aliens generally,

or aliens of a particular nationality, or particular aliens, would violate international law." Restatement (Third) of Foreign Relations Law § 712 cmt. f. (1987). "Discrimination," the Restatement continues, "implies *unreasonable* distinction," and so "[t]akings that invidiously single out property of persons of a particular nationality would be [discriminatory]," whereas "classifications, even if based on nationality, that are rationally related to the state's security or economic policies might not be [discriminatory]" and thus not in violation of international law. *Id.* (emphasis added). The reporter's notes to section 712 cite *Sabbatino* as an example of a discriminatory taking, explaining that Cuba's express "purpose was to retaliate against United States nationals for acts of their Government, and was directed against United States nationals exclusively." *Id.* § 712 reporter's note 5.

H&P-V insists that its complaint, which emphasizes the Venezuelan government's well-known anti-American sentiment, as well as PDVSA's statements decrying the "American empire," successfully pleads a discriminatory takings claim. For its part, Venezuela urges us not to "be the first to revive the overturned Second Circuit precedent" because "there is no internationally recognized exception—based on 'discrimination' or otherwise—to the domestic takings rule." Defs.' Cross Br. 28, 30. Dated and uncited as it may be, however, *Sabbatino* remains good law. *See Farr*, 383 F.2d at 166 (affirming *Sabbatino's* discriminatory takings rationale "with emphasis"). Although "we are not *bound* by the decisions of other circuits," Dissent at 3 (emphasis added), we may "of course find the reasons given for such [decisions] persuasive,"

Northwest Forest Resource Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997) (quoting James Moore et al., *Moore's Federal Practice* ¶ 0.402 (2d ed. 1996))—especially where, as here, our circuit has yet to consider the issue. Moreover, neither Venezuela nor the dissent cites any decision from any circuit that so completely forecloses H&P-V's discriminatory takings theory as to "*inescapably* render the claim[] frivolous" and "*completely* devoid of merit." *Hagans*, 415 U.S. at 538 (emphases added). Given this, and given the Restatement's recognition of discriminatory takings claims, we believe that H&P-V has satisfied this Circuit's forgiving standard for surviving a motion to dismiss in an FSIA case.

Alternatively, Venezuela claims that even if international law recognizes discriminatory takings, "plaintiffs have failed to plead facts to support it" because "the motivation for the expropriation was Venezuela's need for H&P-V's uniquely powerful rigs." Defs.' Br. 31. As it points out, the official decrees cited only the scarcity of these powerful rigs as the reason for the expropriation. The Bill of Agreement, for example, declared H&P-V's drilling rigs necessary for Venezuela's "public benefit and good," Compl. ¶ 4, and President Chávez's decree stated that "the lack thereof would affect [Venezuela's national oil drilling] Plan," *id.* ¶ 19 (alteration in original). Based on these statements, it may well be, as the Restatement puts it, that the taking was "rationally related to [Venezuela's] security or economic policies." Restatement (Third) of Foreign Relations Law § 712 cmt. f (1987).

Other statements, however, went well beyond Venezuela's economic and security needs and could be viewed as demonstrating "unreasonable

distinction" based on nationality. *Id.* PDVSA's press release referred to the "American empire," Compl. ¶ 108, and a National Assembly member warned that opponents of the expropriation were supporting America's mission of "war[] . . . through the large military industry[] of the Empire and its allies," *id.* ¶ 105. At this stage of the litigation, where we view the complaint "in the light most favorable to the plaintiff," *Sachs*, 201 F.2d at 210, these statements are sufficient to plead a "non-frivolous" discriminatory takings claim, *Chabad*, 528 F.3d at 941.

We turn next to Venezuela's argument that H&P-IDC may not invoke the FSIA's expropriation exception because it has no rights in H&P-V's property. By its terms, the expropriation exception applies only to plaintiffs having "rights in property" taken in violation of international law. Moreover, and quite apart from the FSIA, plaintiffs must demonstrate Article III standing by asserting their "own legal rights and interests" rather than resting "claim[s] to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The "shareholder standing rule" is an example of this latter principle. Because corporations are legally distinct from their shareholders, the rule "prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Franchise Tax Board of California v. Alcan Aluminium Limited*, 493 U.S. 331, 336 (1990). Combining both of these principles, Venezuela argues that as a mere

shareholder, H&P-IDC has no rights in the property of its subsidiary and thus lacks standing.

In support of this argument, Venezuela relies almost entirely on *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), an FSIA case in which the Supreme Court held that "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Id.* at 475. This, according to Venezuela, means that "in enacting the FSIA, Congress specifically intended that basic corporate law concepts inform the interpretation of the statute," Defs.' Opening Br. 23, and thus "rights in property" must mean corporate ownership.

Contrary to Venezuela's assertion, however, *Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA. The issue in that case was whether a corporate subsidiary qualified as an instrumentality of a foreign state under the FSIA where the foreign state did not own a majority of the subsidiary's shares but did own a majority of the corporate parent's shares. *Dole Food Co.*, 538 U.S. at 471. Answering that question in the negative, the Court focused on FSIA section 1603(b)(2), which defines "instrumentality" as "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof[.]" *Id.* at 473. Given this definition, the Court refused to "ignore corporate formalities" not because the FSIA generally incorporates corporate law principles, but because section 1603(b)(2) expressly "speaks of ownership." *Id.* at 474.

By contrast, FSIA section 1605(a)(3), the expropriation exception, speaks only of "rights in property" generally, not ownership in shares. The Supreme Court's analysis of another FSIA exception is instructive. In *Permanent Mission of India to the United Nations v. City of New York*, the Court examined the FSIA's abrogation of sovereign immunity in cases involving "rights in immovable property situated in the United States." 551 U.S. 193, 197 (2007) (quoting 28 U.S.C. § 1605(a)(4)). An instrumentality of the Indian government argued that the FSIA "limits the reach of the exception to actions contesting ownership or possession." *Id.* Seeing no such limitation in the statute's text, the Court concluded that "the exception focuses more broadly on 'rights in' property." *Id.* at 198.

So too here. The expropriation exception requires only that "rights in property . . . are in issue," § 1605(a)(3), and we have recognized that corporate ownership aside, shareholders may have rights in corporate property. In *Ramirez de Arellano v. Weinberger*, for example, we considered whether an American citizen, the sole shareholder of three Honduran corporations, had a "cognizable property interest" in land owned by the Honduran corporations and seized by the United States government. 745 F.2d 1500, 1517 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985). Whether Ramirez had property rights in the land, we held, "does *not* turn on whether certain rights which may belong *only* to the Honduran corporation may be asserted 'derivatively' by the sole United States shareholders." *Id.* at 1516. Instead, property rights depend upon whether the shareholders have "rights

of their own, which exist by virtue of their exclusive beneficial ownership, control, and possession of the properties and businesses allegedly seized." *Id.* We thus concluded that notwithstanding corporate ownership, Ramirez had property rights in the Honduran property that he "personally controlled and managed . . . for over 20 years." *Id.* at 1520. "The corporate ownership of land and property," we held, "does not deprive the sole beneficial owners—United States citizens—of a property interest." *Id.* at 1518; *see also Bangor Punta Operations, Inc. v. Bangor & A. R. Co.*, 417 U.S. 703, 713 (1974) (rejecting the argument that, in assessing standing, courts "may not look behind the corporate entity to the true substance of the claims and the actual beneficiaries").

Our dissenting colleague questions the precedential value of *Ramirez* because it was vacated by the Supreme Court on other grounds. Dissent at 4-5. But we have held that "[w]hen the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (quoting *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991)). Because the Supreme Court did not address *Ramirez's* holding that the shareholders had property rights in their corporation's assets, but instead vacated and remanded in light of the U.S. military's subsequent withdrawal of all personnel and facilities from the plaintiffs' land, *De Arellano v. Weinberger*, 788 F.2d 762, 764 (D.C. Cir. 1986) (en

banc) (per curiam); *see Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985), that holding continues to have "precedential weight," *Adewani*, 467 F.3d at 1342.

The dissent argues that even if *Ramirez* continues to have force, it "is not genuinely on point" because it concerned property rights arising from the constitution's due process clause. Dissent at 5. But as discussed above, the FSIA's expropriation exception "focuses . *broadly* on 'rights in' property," *Permanent Mission*, 551 U.S. at 198 (emphasis added), and its text imposes no limitation on the source of those rights.

Ramirez is especially persuasive in this case because H&P-IDC, like the American citizen in *Ramirez*, was the foreign subsidiary's sole shareholder. Moreover, H&P-IDC provided the rigs central to this dispute, Compl. ¶¶ 9, 129-32, and as a result of the expropriation, has suffered a total loss of control over its subsidiary, which has ceased operating as an ongoing enterprise because *all* of its assets were taken, Compl. ¶¶ 75, 81-82. Under these circumstances, H&P-IDC has "put its rights in property in issue in a non-frivolous way." *Chabad*, 528 F.3d at 941. No more is required to survive a motion to dismiss under the FSIA. *See id.* ("non-frivolous contentions" of rights in property suffice to survive a motion to dismiss).

One final point. In the district court, Venezuela urged dismissal of Helmerich & Payne's expropriation claims pursuant to the act-of-state doctrine, which "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within

its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). The district court never reached the issue, opting instead to determine "whether subject-matter jurisdiction exists under the FSIA before deciding whether to dismiss the case under the act of state doctrine." *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 971 F. Supp. 2d 49, 63 (D.D.C. 2013). Acknowledging that the district court's decision is not subject to interlocutory appeal, *see, e.g.*, *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 855 (D.C. Cir. 2000), Venezuela urges us to exercise pendant jurisdiction over this claim. But we "exercise such jurisdiction sparingly" and are especially reluctant to do so where "an issue . . . might be mooted or altered by subsequent district court proceedings." *Id.* Here, Helmerich & Payne's expropriation claims could well fail at the summary judgment stage or following trial on the merits, thus mooting the act-of-state issue. Given this, we think it best not to exercise pendant jurisdiction over Venezuela's act-of-state claim.

Commercial Activity Exception

This brings us, finally, to H&P-V's argument that the FSIA's commercial activity exception extends to its breach of contract claim against PDVSA. This exception, contained in section 1605(a)(2), nullifies foreign sovereign immunity in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; *or* upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; *or* upon an act outside the

> territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2)(emphases added). Because this case involves a contract executed and performed outside the United States, our analysis focuses on the exception's third clause—specifically, whether Venezuela's breach of the drilling contracts "cause[d] a direct effect in the United States." *Id.* A direct effect "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). H&P-V alleges three such effects.

First, relying on our decision in *Cruise Connections Charter Management v. Canada*, 600 F.3d 661 (D.C. Cir. 2010), H&P-V argues that its contracts with third-party vendors in the United States, made pursuant to the drilling contracts, constitute a direct effect. In *Cruise Connections*, we found a "direct effect" where the Royal Canadian Mounted Police (RCMP) cancelled a contract with a U.S. corporation to provide cruise ships during the 2010 Winter Olympics. *Id.* at 662. H&P-V argues that just as in *Cruise Connections*, where the RCMP contract "required . . . subcontract[s] with two U.S.-based cruise lines," *id.*, its agreements with PDVSA required contracts with U.S.-based companies for various drilling rig parts. PDVSA responds that even if H&P-V subcontracted with U.S. vendors, nothing in the drilling contracts obligated them to do so.

We need not resolve this dispute, however, because even assuming that the drilling contracts required subcontracts with American companies, those contracts had no direct effect in the United States. Our holding in *Cruise Connections* rested not on the mere formation of third-party contracts in the United States, but rather on "*losses* caused by the *termination* of [the] contract with [Royal Canadian Mounted Police]." *Cruise Connections*, 600 F.3d at 664 (emphases added); *see also id.* at 666 (noting that the "alleged breach resulted in the direct loss of millions of dollars worth of business in the United States."). Here, H&P-V concedes that none of the third-party contracts was breached. Compl. ¶¶ 126-128, 135. As a result, no losses, and therefore no "direct effect," occurred in the United States.

We are unpersuaded by H&P-V's argument that its inability to renew the third-party contracts constitutes a direct effect caused by PDVSA's breach. Pls.' Br. 62. As noted above, H&P-V had already performed all of its obligations under the existing third-party contracts. Its claim of third-party loss is therefore based on expected loss from *future* contracts that H&P-V says it would have entered into had PDVSA renewed its own contracts with H&P-V instead of breaching them. But H&P-V makes no allegation that PDVSA had an *obligation* to renew its contracts. *See* Compl. ¶ 33 ("All ten contracts . . . expired at the conclusion of an agreed-upon period unless the parties agreed to an extension or an extension occurred by the contract's original terms."). Accordingly, any losses to third parties based on expected future contracts were not a direct effect of PDVSA's breach, but rather of

PDVSA's contractually permitted decision not to renew its agreement with H&P-V.

Contrary to H&P-V's argument, *Kirkham v. Société Air France*, 429 F.3d 288 (D.C. Cir. 2005), does not require a different result. *Kirkham* involved the commercial activity exception's first clause. *See id.* at 290. H&P-V invokes the exception's third clause, under which the "direct effect" in the United States must arise from the foreign state's allegedly unlawful act—here, the breach of contract. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 609 (1992) (examining "whether the Republic of Argentina's default on certain bonds" had a direct effect in the United States).

Relying on the Supreme Court's decision in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), H&P-V claims a second effect in the United States: that PDVSA made payments to Helmerich & Payne's Oklahoma bank account. In *Weltover*, Argentina had issued bonds providing for payment through a currency transfer on the London, Frankfurt, Zurich, or New York markets at the discretion of the creditor. *Id.* at 609-10. Two Panamanian bondholders demanded payment in New York, and when Argentina failed to pay, brought suit in the United States, claiming jurisdiction under the commercial activity exception. *Id.* at 610. The Court had "little difficulty" finding a direct effect because, as a result of Argentina's failure to meet its payment obligations, a contractually required payment into an American bank was not made. *Id.* at 618-19. Relying on *Weltover*, H&P-V emphasizes that both the eastern and western contracts permitted PDVSA to pay a portion of invoiced amounts in U.S. dollars into an

American bank—indeed, PDVSA ultimately paid $65 million this way. Compl. ¶ 44. As in *Weltover*, then, PDVSA's breach meant that money "that was supposed to have been delivered to [an American] bank for deposit was not forthcoming." 504 U.S. at 619. But as PDVSA points out, the contracts gave H&P-V no power to demand payment in the United States. Rather, under both the eastern and western contracts, PDVSA could choose to deposit payments in bolivars in Venezuelan banks whenever, in its "exclusive discretion" and "judgment," it "deem[ed] it discretionally convenient." Compl. ¶¶ 78, 85, 82.

This case presents facts akin to those we examined in *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1144 (D.C. Cir. 1994), in which an Iraqi bank failed to pay on letters of credit, and the payee claimed that the bank's prior payments from its accounts in the United States constituted a direct effect. We rejected this contention because pursuant to the letters of credit, Iraq "might well have paid . . . from funds in United States banks but it might just as well have done so from accounts located outside of the United States." *Id.* at 1146-47 Such unlimited discretion, we concluded, meant that unlike in *Weltover*, no money was "'supposed' to have been paid" in the United States. *Id.* at 1146 (quoting *Weltover*, 504 U.S. at 608). In other words, where, as here, the alleged effect depends solely on a foreign government's discretion, we cannot say that it "flows in a straight line without deviation or interruption." *Princz*, 26 F.3d at 1172.

Finally, relying on *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995), H&P-V contends that PDVSA's breach halted a flow of commerce between Venezuela and the United

States, thus causing a direct effect. McKesson, an American corporation, alleged that the Iranian government had illegally divested it of its investment in a dairy located in Iran. *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 441 (D.C. Cir. 1990). In doing so, we concluded, Iran halted a "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of [the dairy]," thereby causing a direct effect. *Id.* at 451. H&P-V insists that the same is true here. We think not. Iran's actions in "freezing-out American corporations in their ownership of [the dairy]" had the direct and immediate effect of halting a flow of resources and capital between the United States and Iran. *Id.* By contrast, any interruptions in commerce between the United States and PDVSA flowed immediately not from PDVSA's breach of contract, but rather from Helmerich & Payne's decision to cease business in Venezuela. And, given that the contracts were for set periods of time ranging from five months to one year, there was no guarantee of future business between Helmerich & Payne and PDVSA beyond those contracts.

III

We affirm the district court's denial of Venezuela's motion to dismiss H&P-IDC's expropriation claim. In all other respects, we reverse and remand for further proceedings consistent with this opinion.

So ordered.

SENTELLE, *Senior Circuit Judge*, dissenting in part and concurring in part: I will not reiterate the facts in this controversy, as the careful opinion of the majority sets them forth in necessary detail and with inerrant accuracy. Further, I fully concur in the majority's discussion and conclusion concerning the issues related to the commercial activity exception set forth in 28 U.S.C. § 1605(a)(2). However, despite my general agreement with the majority's exposition of the facts underlying the claim for expropriation, I dissent from the conclusion that those facts bring this case within the expropriation exception set forth in 28 U.S.C. § 1605(a)(3).

As the majority recognizes, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604, *et. seq.*, "'establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state.'" Maj. Op. at 8 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992)). As the majority further recognizes, "[t]he Act provides that 'a foreign state *shall* be immune from the jurisdiction of the courts of the United States and of the States.'" Maj. Op. at 8 (emphasis in original) (quoting 28 U.S.C. § 1604). Therefore, unless the expropriation claim falls within one of the exceptions set forth in 28 U.S.C. §§ 1605-07, the district court, and derivatively this court, has no jurisdiction over the claim. The majority concludes that claim falls within the exception created by § 1605(a)(3). I disagree.

That exception permits the courts of the United States to exercise jurisdiction "in any case . . . in which rights in property taken *in violation of international law* are in issue." § 1605(a)(3) (emphasis added). The majority states, Venezuela

argues that "as a Venezuelan national, H&P-V may not claim a taking in violation of *international* law." Maj. Op. at 8 (emphasis in original). Further, "under generally applicable corporate law principles, H&P-IDC has no 'rights in property' belonging to its subsidiary and thus lacks standing," to bring this action. Maj. Op. at 8. I again look to the majority's statement of the facts which acknowledges: "All [parties] agree that for purposes of international law, 'a corporation has the nationality of the state under the laws of which the corporation is organized.'" Maj. Op. at 9 (quoting Restatement (Third) of Foreign Relations Law § 213 (1987)).

The majority further recognizes "that generally, a foreign sovereign's expropriation of its own national's property does not violate international law." Maj. Op. at 9 (citing *United States v. Belmont*, 301 U.S. 324, 332 (1937)). This principle is known as the domestic takings rule, which provides that "[w]hat another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled." *Belmont*, 301 U.S. at 332.

Like the majority, I recognize that Venezuela's position in this litigation is that

> the domestic takings rule ends this case because H&P-V, as a Venezuelan national, may not seek redress in an American court for wrongs suffered in its home country. This argument has a good deal of appeal. Having freely chosen to incorporate under Venezuelan law, H&P-V operated in that

> country for many years and reaped the benefits of its choice, including several extremely lucrative contracts with the Venezuelan government. Given this, and especially given that H&P-V expressly agreed that these contracts would be governed by Venezuelan law in Venezuelan courts, one might conclude that H&P-V should live with the consequences of its bargain.

Maj. Op. at 10. Unlike the majority, I believe that Venezuela's position is well taken. When appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law. To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate Venezuela's sovereignty, the value protected by the FSIA.

The majority supports its extended examination with the decision in *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962). While that case may stand for the proposition that the courts of the United States can examine the fairness of a foreign sovereign's expropriation, I cannot join the majority's conclusion that "*Sabbatino* remains good law" Maj. Op. at 12. Perhaps *Sabbatino* is good law in the Second Circuit, but we are not bound by the decisions of other circuits, and I do not conclude that *Sabbatino* has ever been or remains good law in the District of Columbia Circuit. I would, therefore, conclude that Venezuela's reliance on the domestic takings rule is well taken and should compel the dismissal of Helmerich & Payne's expropriation claim for want of jurisdiction.

I would further note that I differ with the majority's apparent belief that Venezuela's reliance upon *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), is misplaced. *See* Maj. Op. at 14. The majority asserts that "[c]ontrary to Venezuela's assertion, . . *Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA." *Id.* While this may be literally accurate, it is at least equally accurate that neither *Dole Food* nor any other case constitutes a wholesale rejection of corporate law. As both the majority's opinion and mine have recognized, shareholders ordinarily have no standing to assert claims on behalf of a corporation for its property.

Neither do I find compelling the majority's reliance on two cases from this circuit: *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008), and *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1517 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985). *Chabad* is authority, at most, for the proposition that "[i]n an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property . in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" Maj. Op. at 9 (quoting *Chabad*, 528 F.3d at 942) (emphasis in original). As the plaintiff here has, by reason of the domestic takings rule, failed to plead a "taking in *violation of international law*," *Chabad* supports rather than undermines Venezuela's motion for dismissal. 528 F.3d at 943 (emphasis added). *Ramirez* warrants no separate discussion.

I would note first that the judgment in *Ramirez* was vacated by the Supreme Court. *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985). As the majority states,

> we have held that, "[w]hen the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (quoting *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991)).

Maj. Op. at 16. For what it's worth, I question whether the language quoted from *Adewani and Action Alliance* in fact states a *holding* of this court to the effect that we are *bound* by the reasoning of vacated opinions. Rather, each instance paraphrases language of Justice Powell quoted in a parenthetical following the quoted language from *Action Alliance*. *Action Alliance* parenthetically quoted Justice Powell as stating:

> Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, . . . the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law . . .

County of Los Angeles v. Davis, 440 U.S. 625,646 n.10 (Powell, J., dissenting) (quoted in *Action Alliance*, 930 F.2d at 83-84). In other words, the prior reasoning of the court in vacated opinions may be persuasive, even powerfully persuasive, but I question whether it is binding precedent.

Be that as it may, *Ramirez* is not genuinely on point. *Ramirez* dealt with the question of whether the shareholders of a corporation ousted by acts of the United States government had a property interest warranting due process protection under the Constitution. The *Ramirez* Court had no occasion to consider whether the statutory waiver of a foreign government's sovereign immunity encompasses the sort of second degree property interest protected against invasion by our government under the due process concepts of our Constitution.

Supreme Court
FILED
AUG 19
OFFICE OF THE CLERK

No. 15-423

IN THE
Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

JOSEPH D. PIZZURRO
ROBERT B. GARCÍA
KEVIN A. MEEHAN
JUAN O. PERLA
CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178

BRUCE D. OAKLEY
Counsel of Record
HOGAN LOVELLS US LLP
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

WILLIAM L. MONTS, III
CATHERINE E. STETSON
MARY HELEN WIMBERLY
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The Foreign Sovereign Immunities Act (FSIA) provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Under the Act's expropriation exception, in pertinent part, "[a] foreign state shall not be immune *** in any case *** in which rights in property taken in violation of international law are in issue." *Id.* § 1605(a)(3).

The question presented is: What standard should courts use to determine whether a complaint's allegations that "rights in property taken in violation of international law are in issue" are legally sufficient to confer jurisdiction under the FSIA's expropriation exception?

PARTIES TO THE PROCEEDINGS

1. Bolivarian Republic of Venezuela, Petróleos de Venezuela, S.A., and PDVSA Petróleo, S.A., petitioners on review, were defendants-appellants and cross-appellees below.

2. Helmerich & Payne International Drilling Co., respondent on review, was plaintiff-appellee below. Helmerich & Payne de Venezuela, C.A., respondent on review, was plaintiff-appellee and cross-appellant below.

RULE 29.6 DISCLOSURE STATEMENT

Bolivarian Republic of Venezuela is a sovereign state and is not a corporation.

Petróleos de Venezuela, S.A., is a corporation organized and existing under the laws of Venezuela. It is wholly owned by the Bolivarian Republic of Venezuela. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

PDVSA Petróleo, S.A., is a corporation organized and existing under the laws of Venezuela. Petróleos de Venezuela, S.A. owns all of the outstanding stock of PDVSA Petróleo, S.A., and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
RULE 29.6 DISCLOSURE STATEMENT iii
TABLE OF AUTHORITIES vii
OPINIONS BELOW 1
JURISDICTION 1
STATUTE INVOLVED 2
INTRODUCTION 2
STATEMENT 5
A. Factual Background 5
B. Procedural History 6
SUMMARY OF ARGUMENT 14
ARGUMENT 17
I. THE EXPROPRIATION EXCEPTION REQUIRES A COURT TO DECIDE WHETHER A COMPLAINT HAS ACTUALLY PUT "IN ISSUE" "RIGHTS IN PROPERTY TAKEN IN VIOLATION OF INTERNATIONAL LAW" 17
A. Foreign States Are Presumptively Immune From The Jurisdiction Of U.S. Courts 17
B. This Court Applies A Single Standard To Review Jurisdictional Pleadings Under The FSIA's Exceptions 22

TABLE OF CONTENTS—Continued

Page

C. The Court's Usual Standard For Reviewing Pleadings Under The FSIA's Exceptions Should Apply To The Expropriation Exception 27

II. THE FEDERAL-QUESTION PLEADING STANDARD DOES NOT APPLY TO THE EXPROPRIATION EXCEPTION 30

A. The Expropriation Exception Does Not Create A Standard "Analogous" To The Federal-Question Statute 30

B. Applying *Bell* To The Expropriation Exception Would Have Serious Adverse Consequences 38

C. This Case Shows Why The Court Of Appeals' Standard Is Wrong 44

CONCLUSION 47

STATUTORY ADDENDUM

TABLE OF AUTHORITIES

Page(s)

CASES:

Abelesz v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012) 27, 43

Agudas Chasidei Chabad of U.S. v. *Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008) 10, 30, 31, 32, 42

American Well Works Co. v. *Layne & Bowler Co.*, 241 U.S. 257 (1916) 33

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 37

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) ..... *passim*

Banco Nacional de Cuba v *Sabbatino*, 307 F.2d 845 (2d Cir. 1962) 10, 11, 12, 44, 45

Bell v. *Hood*, 327 U.S. 678 (1946) ..... *passim*

Case Concerning Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belgium v. *Spain), Judgment*, 1970 I.C.J. 3 (Feb. 5, 1970) 44, 45

Cassirer v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) 43

Chambers v. *NASCO, Inc.*, 501 U.S. 32 (1991) 38

Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 11, 29, 42

Fischer v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015) 43

TABLE OF AUTHORITIES—Continued

Page(s)

Franchise Tax Bd. of Cal. v. *Construction Laborers Vacation Tr.*, 463 U.S. 1 (1983)..... 33, 35

Grable & Sons Metal Prods., Inc. v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005)..... 33, 35

Hausman v. *Buckley*, 299 F.2d 696 (2d Cir. 1962)..... 45

I.T. Consultants, Inc. v. *Islamic Republic of Pak.*, 351 F.3d 1184 (D.C. Cir. 2003)..... 7

In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998)..... 44

Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Manning*, 136 S. Ct. 1562 (2016).. 34, 37, 41

OBB Personenverkehr AG v. *Sachs*, 136 S. Ct. 390 (2016)..... *passim*

Permanent Mission of India to United Nations v. *City of New York*, 551 U.S. 193 (2007)..... *passim*

Phoenix Consulting, Inc. v. *Republic of Ang.*, 216 F.3d 36 (D.C. Cir. 2000)..... 29

Primus Auto. Fin. Servs., Inc. v. *Batarse*, 115 F.3d 644 (9th Cir. 1997)..... 38

Ramirez de Arellano v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984)..... 11, 13, 45

Republic of Arg. v. *Weltover, Inc.*, 504 U.S. 607 (1992)..... 19

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004)..... 14, 19, 20, 21

Republic of Iraq v. *Beaty*, 556 U.S. 848 (2009)..... 10, 21, 37, 38

TABLE OF AUTHORITIES—Continued

Page(s)

Romero v. *International Terminal Operating Co.*, 358 U.S. 354 (1959) 34, 35, 47

Ruhrgas AG v. *Marathon Oil Co.*, 526 U.S. 574 (1999) 19

Samantar v. *Yousuf*, 560 U.S. 305 (2010) 19

Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) ..... *passim*

Simon v. *Republic of Hung.*, 812 F.3d 127 (D.C. Cir. 2016) ..... *passim*

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 27, 39

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 43

United States v. *Belmont*, 301 U.S. 324 (1937) 44

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) ..... *passim*

CONSTITUTIONAL PROVISION:

U.S. Const. art. III, § 2, cl. 1 ..... 33, 36

STATUTES:

28 U.S.C. § 41(1) 31

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1330 2

28 U.S.C. § 1330(a) 14, 21

28 U.S.C. § 1330(b) 19

28 U.S.C. § 1331 ..... *passim*

28 U.S.C. § 1332 2

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1332(a)(2)-(4) 2
28 U.S.C. § 1391(f) 2
28 U.S.C. § 1441(d) 2
28 U.S.C. §§ 1602-1611 2
28 U.S.C. § 1603(a) 6
28 U.S.C. § 1603(b) 6
28 U.S.C. § 1604 ..... *passim*
28 U.S.C. §§ 1605-1607 ..... 2, 14, 17, 20
28 U.S.C. § 1605(a)(1) 20
28 U.S.C. § 1605(a)(2) 7, 20, 24
28 U.S.C. § 1605(a)(3) ..... *passim*
28 U.S.C. § 1605(a)(4) 20, 22
28 U.S.C. § 1605(a)(5) 20, 23
28 U.S.C. § 1605(a)(6) 21
28 U.S.C. § 1605(b) 21
28 U.S.C. § 1605(d) 21
28 U.S.C. § 1605A 21
28 U.S.C. § 1606 28
28 U.S.C. § 1607 21

RULES:

Fed. R. Civ. P. 11 38
Fed. R. Civ. P. 12(b)(6) 43
Fed. R. Civ. P. 54(b) 10

LEGISLATIVE MATERIAL:

H.R. Rep. No. 1487, 94th Cong., 2d Sess. (Sept. 9, 1976) 18, 19, 20, 38

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. Pa. L. Rev. 639 (1942) 35

William Meade Fletcher, *Fletcher on Corporations* (rev. 2008) 45

Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* (1927) 35

IN THE

Supreme Court of the United States

No. 15-423

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The court of appeals' decision is reported at 784 F.3d 804 and reproduced in the joint appendix at J.A. 170-199. The district court's decision is reported at 971 F. Supp. 2d 49 and reproduced at J.A. 124-169.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2015, and a timely petition for panel rehearing and rehearing en banc was denied on July 30, 2015. Pet. App. 95a-98a. A timely petition for certiorari was filed on October 5, 2015 and granted on June 28, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The expropriation exception of the Foreign Sovereign Immunities Act of 1976 (FSIA) provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * *
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States
> * * * [28 U.S.C. § 1605(a)(3).]

The entire FSIA, as amended, *id.* §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611, the federal-question statute, *id.* § 1331, and portions of the diversity statute, *id.* § 1332, are reproduced in the addendum to this brief.

INTRODUCTION

Jurisdictional analysis under the FSIA begins with the presumption of immunity. Foreign states "shall be immune from the jurisdiction of" U.S. courts, unless one of the carefully delineated statutory exceptions to immunity applies. 28 U.S.C. § 1604; *see id.* §§ 1605-1607 These exceptions are narrow; under the statutory regime, "[a] foreign state is normally

immune." *Verlinden B.V* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (*Verlinden*).

The FSIA exception at issue in this case, the expropriation exception, is no different. It abrogates sovereign immunity only when "rights in property taken in violation of international law *are* in issue." 28 U.S.C. § 1605(a)(3) (emphasis added). The text does not say that jurisdiction exists whenever the specified rights are "non-frivolously alleged to be" in issue. The expropriation exception is limited to circumstances where the complaint alleges rights that *actually are* legally recognized "rights in property," and a taking that *actually is* a "violation of international law." *Id.*

This Court's precedents allow nothing less. When interpreting the FSIA's exceptions, this Court consistently has applied a single standard: a complaint must plead facts that, if accepted as true, establish all of the elements of the relevant exception. Even when there is overlap between a jurisdictional requirement and an issue related to the plaintiff's cause of action, the standard is the same. A "court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." *Verlinden*, 461 U.S. at 493-494.

The court below declined to decide whether the complaint actually identified legally recognized rights in property, taken in a manner that violates international law. Because the plaintiffs' cause of action parroted the statutory language of the expropriation exception, the court concluded that there was an overlap between jurisdictional issues and merits issues. Therefore, it held that the standard

for pleading federal-question jurisdiction under 28 U.S.C. § 1331, as set forth in *Bell* v. *Hood*, 327 U.S. 678 (1946), should apply. According to the court of appeals, the complaint could be dismissed for lack of jurisdiction only if the plaintiffs' allegations of "rights in property taken in violation of international law," 28 U.S.C. § 1605(a)(3), were "'wholly insubstantial or frivolous,'" J.A. 178 (citation omitted).

The *Bell* pleading standard should not apply to the expropriation exception. *Bell* adopted the frivolousness standard as an interpretation of 28 U.S.C. § 1331, a statute enacted to establish the appropriate boundary between cases that may be brought in federal court and cases that should instead be litigated in state court. Given that historical purpose, it makes good sense that all the statute requires to confer federal jurisdiction is the pleading of a non-frivolous federal question.

The FSIA is different. It controls whether a foreign state is subject to suit *anywhere* in the United States for the dispute in question. If not, the foreign state is immune from the jurisdiction of *all* U.S. courts for that dispute. *Id.* § 1604. And unlike the federal-question statute, which requires only that a case "aris[e] under" federal law, *id.* § 1331, the FSIA contains "detailed federal law standards" that "comprehensively regulat[e] the amenability of foreign nations to suit in the United States," *Verlinden*, 461 U.S. at 493-494. A judicial standard that requires that a plaintiff plead only non-frivolous allegations to overcome the jurisdictional hurdle is, at best, a passing nod to general principles—not an application of detailed standards. Accordingly, the same analysis that this Court has always applied to the FSIA's exceptions should also apply to the expropriation ex-

ception: courts should determine whether the plaintiff has *actually* pleaded a taking of rights in property in violation of international law.

STATEMENT

A. Factual Background

The plaintiffs in this lawsuit are Helmerich & Payne International Drilling Co. (H&P-IDC), an American corporation, and its wholly owned subsidiary Helmerich & Payne de Venezuela, C.A. (H&P-V), a Venezuelan corporation (collectively, the H&P plaintiffs). J.A. 56-57 (¶¶ 9-10). The defendants are the Bolivarian Republic of Venezuela (the Republic), Petróleos de Venezuela, S.A. (PDVSA), and PDVSA Petróleo, S.A. (Petróleo) (collectively, Venezuela or defendants). J.A. 57-59 (¶¶ 11-13).

H&P-V has been in the oil-drilling business in Venezuela since 1954 and began performing drilling services for PDVSA and Petróleo in the 1970s. J.A. 59 (¶ 16). It continued to do so until the relationship deteriorated six years ago. J.A. 59-60, 65, 69-70 (¶¶ 16, 34, 50-52). Following a contractual dispute with Petróleo, Helmerich & Payne, Inc.—the ultimate parent of H&P-IDC and H&P-V—announced that H&P-V would cease drilling operations in Venezuela when its contracts expired. J.A. 69-70 (¶ 50). By the end of 2009, H&P-V had ceased drilling, disassembled its eleven oil rigs, and stored them in H&P-V's yards. J.A. 70 (¶ 53).

In June 2010, the Venezuelan National Assembly published a Bill of Agreement declaring that H&P-V's oil rigs and associated property were of "public utility and social interest." C.A. J.A. 97 (Bill of Agreement). It found that the rigs were "idle,"

"inactive," and "very scarce," and that "the use of the oil rigs was necessary" for drilling wells in Venezuela. *Id.* The Bill of Agreement therefore recommended that the National Executive expropriate the eleven oil rigs and related property. *Id.* The National Executive did so. C.A. J.A. 104-107 (Decree of Expropriation). Expropriation proceedings in the Venezuelan courts began in July 2010 to effectuate transfer of title to the property, determine the fair value of the assets, and provide compensation to all interested parties. J.A. 75-76, 78-79 (¶¶ 72-73, 86-88); C.A. J.A. 107 (Decree of Expropriation art. 4). H&P-V has appeared in these proceedings, which are ongoing. J.A. 75-76 (¶¶ 72-73).

B. Procedural History

1. In September 2011, H&P-IDC and H&P-V filed a two-count complaint in the United States District Court for the District of Columbia against the Republic, PDVSA, and Petróleo. Both plaintiffs asserted a joint claim against all three defendants for a taking in violation of international law, and each sought the same damages remedy for the taking. J.A. 103-104 (¶¶ 172-181) (Count I); *see* J.A. 115 (¶ 282). In addition, H&P-V claimed that PDVSA and Petróleo had breached certain of the parties' drilling-services contracts (the "Drilling Contracts"). J.A. 104-115 (¶¶ 182-281) (Count II).

The H&P plaintiffs purported to bring this case under the FSIA, alleging that the Republic is a "foreign state" under 28 U.S.C. § 1603(a), and PDVSA and Petróleo are each an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b). J.A. 57-59 (¶¶ 11-13). Accordingly, these defendants are presumptively immune from the jurisdiction of

the district court. The court has subject-matter jurisdiction only if one of the FSIA's exceptions to Venezuela's foreign-sovereign immunity applies. For the takings claim, both plaintiffs invoked the expropriation exception, 28 U.S.C. § 1605(a)(3) (abrogating immunity in cases "in which rights in property taken in violation of international law are in issue" and there is the requisite nexus to the United States), and for the contract claims, H&P-V cited the commercial-activity exception, *id.* § 1605(a)(2) (abrogating immunity in cases "in which the action is based * * * upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States").

2. Defendants moved to dismiss the complaint on multiple jurisdictional and other threshold grounds. The H&P plaintiffs responded with a motion to compel preliminary fact discovery on jurisdiction, immunity, and venue. Pls.' Mot. to Compel, 11-cv-1735 Docket Entry No. 29 (Oct. 23, 2012).

After briefing on the motion to compel was completed, but before the H&P plaintiffs had filed any opposition to defendants' motions to dismiss, the parties reached an agreement concerning the pending motions. Joint Stipulation, 11-cv-1735 Docket Entry No. 34 (Jan. 10, 2013). Under that agreement, the H&P plaintiffs withdrew their motion to compel discovery, and the parties sought instead to follow the procedure approved by the court of appeals in *I.T. Consultants, Inc.* v. *Islamic Republic of Pak.*, 351 F.3d 1184 (D.C. Cir. 2003), by identifying issues that could be resolved as matters of law on the face of the complaint and briefing those issues first. *See id.* at 1188 (foreign state may seek "a ruling on its immuni-

ty on the basis of the allegations in the complaint" before the district court must "resolve any relevant factual disputes"). This approach had the potential to secure a threshold dismissal of the case on immunity grounds without the need for the district court to resolve any factual issues related to jurisdiction.

The issues were: (1) whether H&P-V was a national of Venezuela and therefore unable to claim that a taking of its property constituted a violation of international law under the expropriation exception; (2) whether the district court could reach a particular defense (act-of-state) before resolving the FSIA issues and, if so, whether that defense barred the takings claim; (3) whether H&P-V had pleaded a direct effect in the United States as required by the commercial-activity exception; and (4) whether H&P-IDC as a corporate parent could invoke the expropriation exception when the property expropriated belonged to its subsidiary H&P-V J.A. 119-120.

3. The district court accepted the parties' stipulation, ordering that briefing on the motions to dismiss would proceed on the four issues identified by the parties. J.A. 117-121. At the conclusion of the briefing, the court granted in part and denied in part the motions to dismiss with respect to those issues. J.A. 124-169.

On the takings claim, the two disputed jurisdictional issues—issues (1) and (4) above—could be reduced to a single question: whether H&P-V and H&P-IDC had each pleaded that their "rights in property taken in violation of international law are

in issue." 28 U.S.C. § 1605(a)(3). The district court answered that question differently for each plaintiff.[1]

For H&P-V, the district court held that because H&P-V is a Venezuelan corporation, it is a Venezuelan national under international law. J.A. 134-142. The expropriation exception thus did not apply to H&P-V's takings claim; under the domestic-takings rule, a sovereign's taking of the property of its own national does not violate international law. *Id.*

The district court reached the opposite conclusion for H&P-IDC. The court held that H&P-IDC could claim that its own "rights in property" were "in issue" for purposes of the expropriation exception. J.A. 160-168. Even though the property taken was owned, possessed, and operated solely by its subsidiary, H&P-V, the court ruled that Venezuela had deprived H&P-IDC "of its essential and unique rights as sole shareholder of H&P-V" by, among other things, "frustrating its control over the company." J.A. 168.

The district court denied PDVSA and Petróleo's motion to dismiss the contract claims, holding that the alleged breaches of contract had a direct effect in the United States and thus were within the court's jurisdiction. J.A. 146-158.

4. a. Both sides appealed. Invoking appellate jurisdiction under the collateral-order doctrine, Vene-

---

[1] The district court declined to resolve the act-of-state issue, concluding that it could not reach a merits defense before resolving all jurisdictional issues. J.A. 142-146. Although Petitioners maintain that was error, the D.C. Circuit declined to exercise pendent appellate jurisdiction over the issue, J.A. 187-188, and it is not now before this Court.

zuela appealed the district court's conclusion that H&P-IDC could invoke the property rights of its subsidiary, H&P-V, to obtain jurisdiction over the defendants under the expropriation exception. *See, e.g.*, *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 854 (2009); *Permanent Mission of India to United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007) (*Permanent Mission*). H&P-V, for its part, cross-appealed the district court's domestic-takings ruling after the court entered partial final judgment against H&P-V under Federal Rule of Civil Procedure 54(b). *See* Pet. App. 92a-94a.

b. The D.C. Circuit affirmed in part and reversed in part. J.A. 170-199. In a split decision, two of the three panel members applied what they described as the D.C. Circuit's "exceptionally low bar" for evaluating jurisdictional pleadings under the expropriation exception. J.A. 178. The majority explained, "we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property * * * in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" *Id.* (ellipsis in original) (quoting *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 943 (D.C. Cir. 2008)).

Assessing H&P-V's takings claim alongside that "exceptionally low bar," the majority held that the district court erred in dismissing it. Citing *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964), the majority concluded that, because the complaint had alleged that the expropriation of H&P-V's property was motivated by discriminatory animus against the company's American parent corporation (H&P-IDC), the case *might* fall within a

supposed "discrimination" exception to the domestic-takings rule. J.A. 179-183. The majority recognized that *Sabbatino* had never been applied to the FSIA's jurisdictional provisions, but nevertheless concluded that, "[d]ated and uncited as it may be, * * * *Sabbatino* remains good law." J.A. 181. And that was enough under the D.C. Circuit's "forgiving standard" to "surviv[e] a motion to dismiss in an FSIA case." J.A. 182.

The majority next affirmed the district court's refusal to dismiss H&P-IDC's takings claim because H&P-IDC—as the sole shareholder of H&P-V—had purportedly pleaded, in a non-frivolous manner, that its *own* rights in the property of H&P-V were taken in the expropriation. J.A. 183-187. The majority rejected Venezuela's argument that *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), stood for the proposition that the FSIA incorporated basic principles of corporate law, such that a shareholder does not have an independent and direct property interest in corporate assets that it may assert under the expropriation exception. J.A. 184. To the contrary, the majority found that a vacated D.C. Circuit due-process decision established that "shareholders may have rights in corporate property." J.A. 185 (citing *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1517 (D.C. Cir. 1984) (en banc), *cert. granted, judgment vacated*, 471 U.S. 1113 (1985)). The majority also read this Court's decision in *Permanent Mission*, 551 U.S. 193, to demonstrate that, irrespective of corporate-ownership principles, the FSIA "imposes no limitation on the source" of the "rights in property" that may be claimed under the expropriation exception. J.A. 185-187. Based on this chain of reasoning, the majority concluded that H&P-IDC, as

H&P-V's corporate parent (and sole shareholder), had non-frivolously pleaded that it had property rights in issue, even though it did not own, possess, or have contractual rights to the oil rigs and related property at the heart of the parties' dispute. J.A. 187.

Finally, all three panel members agreed that the district court's finding of jurisdiction over H&P-V's contract claims should be reversed. They unanimously held that the alleged breaches did not cause a direct effect in the United States under the FSIA's commercial-activity exception. J.A. 188-193.

c. Judge Sentelle dissented from the panel's ruling on the takings claim. J.A. 194-199. As for H&P-V, he reasoned that "[w]hen appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law." J.A. 196. In Judge Sentelle's view, allowing H&P-V to subject Venezuela to litigation on the merits, simply by pleading discrimination, "appears *** to violate Venezuela's sovereignty, the value protected by the FSIA." *Id.* He rejected *Sabbatino* as providing an adequate basis for an exception to the domestic-takings rule and would instead "conclude that Venezuela's reliance on the domestic takings rule is well taken and should compel the dismissal of [H&P-V]'s expropriation claim for want of jurisdiction." *Id.*

Judge Sentelle also disagreed with the majority's decision on H&P-IDC's claim. He observed that, under traditional corporate-law principles, "shareholders ordinarily have no standing to assert claims on behalf of a corporation for its property." J.A. 197 As Judge Sentelle saw it, no authority has rejected the application of general corporate-law principles to the

FSIA, so there was no reason to depart from those principles when interpreting the statute. *Id.* Judge Sentelle also concluded that the D.C. Circuit's decision in *Ramirez*—the judgment for which was subsequently vacated—was not binding precedent, and was not on point in any event because it was a due process case. J.A. 198-199.

d. Venezuela sought panel rehearing and rehearing en banc. The panel denied the petition, with Judge Sentelle voting to grant rehearing. Pet. App. 95a-96a. A vote for rehearing en banc was called, but a majority of the court's active judges declined to rehear the case. Pet. App. 97a-98a.

5. Venezuela moved in the court of appeals and this Court to stay the mandate pending a petition for certiorari. Both motions were denied. The parties returned to the district court, where the H&P plaintiffs filed a second motion to compel discovery. Because Venezuela's "purely legal claims for dismissal based on sovereign immunity" had "been rejected," the H&P plaintiffs claimed they were entitled to sweeping discovery from Venezuela concerning the factual bases for Venezuela's jurisdictional challenge. Pls.' Mem. of Points & Auths., Second Mot. to Compel 1, 11-cv-1735 Docket Entry No. 81 (Jan. 20, 2016). The district court granted in part and denied in part the H&P plaintiffs' motion to compel, ordered PDVSA and Petróleo to turn over a significant amount of discovery, and directed the Republic also to participate in discovery. Order & Mem. Op., 11-cv-1735 Docket Entry Nos. 113, 114 (May 13, 2016).

6. Both sides petitioned this Court for certiorari. The Court granted certiorari on the third question presented by Venezuela's petition: whether the

pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous. The district court subsequently stayed all proceedings pending resolution of the matter before this Court. Order, 11-cv-1735 Docket Entry No. 124 (June 28, 2016).

SUMMARY OF ARGUMENT

This case asks the Court to decide what standard courts should use to evaluate the legal sufficiency of a complaint's jurisdictional allegations under the FSIA's expropriation exception. The answer is that a court should decide whether the complaint pleads *legally recognized* rights in property and a taking that is an *actual* violation of customary international law.

I. The FSIA creates an express statutory presumption of foreign-sovereign immunity. *See* 28 U.S.C. § 1604; *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). This presumption can be overcome—and a court may assert jurisdiction over a claim against a foreign sovereign—only if the substantive requirements for abrogating foreign-sovereign immunity set forth in 28 U.S.C. §§ 1605-1607 are satisfied. *See id.* § 1330(a). Because the Act carefully "carves out" these "exceptions to its general grant of immunity," *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004), courts must take special care to ensure that their requirements are met, lest an overly expansive standard upset the careful balance Congress struck.

To this end, when deciding cases evaluating the legal sufficiency of the pleadings under the FSIA's ex-

ceptions, this Court has consistently applied a single standard. A plaintiff must plead facts that, if taken as true, establish the existence of all of the elements set out in the relevant statutory exception. Then, "the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493-494 (1983).

The expropriation exception is no different. To be sure, depending on how a plaintiff chooses to plead its cause of action, the requirements of the expropriation exception might overlap with the elements of the underlying claim for relief—but that is no reason to depart from the usual analysis. In prior cases involving the FSIA's exceptions, this Court has not hesitated to decide jurisdictional questions that happen to overlap with issues affecting the merits. The text, history, and purpose of the FSIA, as well as this Court's precedents, demand that the same standard apply to the expropriation exception as applies to the other exceptions. Under that standard, a court evaluating the legal sufficiency of the jurisdictional pleadings should decide whether the rights claimed to be "in issue" in the complaint actually *are* "rights in property taken in violation of international law." 28 U.S.C. § 1605(a)(3).

II. The court of appeals below did not follow this jurisdictional analysis. Instead, the court concluded that a complaint survives jurisdictional dismissal so long as its allegations that "rights in property taken in violation of international law are in issue," *id.*, are not "'wholly insubstantial or frivolous.'" J.A. 178 (citation omitted). This standard derives from *Bell* v. *Hood*, 327 U.S. 678 (1946), which governs cases

brought under the federal-question statute, 28 U.S.C. § 1331. *See* J.A. 178 (quoting *Bell*, 327 U.S. at 682). *Bell* did not create a general rule applicable to all jurisdictional statutes, however; it interpreted Section 1331. Its non-frivolousness standard thus has no place in the evaluation of FSIA pleadings.

And there are good reasons not to apply the federal-question pleading standard to the expropriation exception. For starters, the text of the federal-question statute is not comparable to the text of the expropriation exception. Section 1331 imposes no substantive prerequisites to jurisdiction; it broadly confers jurisdiction over any "civil action[ ] arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The expropriation exception, by contrast, is one of the FSIA's substantive prerequisites that—as befits an exception—is far more specific. It requires a plaintiff to put "in issue" a specific type of right ("rights in property"), alleged harm ("taken"), and legal violation ("in violation of international law"). *Id.* § 1605(a)(3).

The histories, policies, and purposes of the two statutes also are completely different. The federal-question statute is intended to determine whether a case is properly brought in federal court, or whether it instead should be litigated in state court—which is why, under that statute, courts ask only whether the plaintiff has pleaded a non-frivolous federal question. The FSIA, by contrast, governs whether a foreign state may be sued in *any* United States court. If none of the exceptions is satisfied, the foreign state is immune from the jurisdiction of U.S. courts entirely for that dispute. Because of this, and the presumption that foreign states are normally and ordinarily immune from jurisdiction, this Court has always lim-

ited jurisdiction over foreign states to cases where plaintiffs have pleaded facts that, if taken as true, actually establish all of the requirements of the relevant exception.

Finally, the consequence of applying the *Bell* standard further shows how poorly it fits within the context of the FSIA. Under the court of appeals' approach, a plaintiff may hale a foreign state into court and subject it to the burdens of litigation—so long as the complaint's allegations meet *Bell*'s "exceptionally low" non-frivolousness standard. J.A. 178. Foreign-sovereign immunity is supposed to protect foreign states from the burdens of litigation; the court of appeals' rule makes them a matter of course.

ARGUMENT

I. THE EXPROPRIATION EXCEPTION REQUIRES A COURT TO DECIDE WHETHER A COMPLAINT HAS ACTUALLY PUT "IN ISSUE" "RIGHTS IN PROPERTY TAKEN IN VIOLATION OF INTERNATIONAL LAW."

A. Foreign States Are Presumptively Immune From The Jurisdiction Of U.S. Courts.

A strong presumption *against* jurisdiction forms the starting point for any FSIA analysis: "a foreign state *shall be immune* from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (emphasis added). Thus the FSIA at the outset puts a heavy thumb on the immunity side of the scale: "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies,

a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993).

1. There is a historical reason behind this strong presumption. "From the Nation's founding until 1952, foreign states were 'generally granted *** complete immunity from suit' in United States courts *** " *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 n.1 (1989) (*Amerada Hess*) (first ellipsis in original) (quoting *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (*Verlinden*)). Courts declined to exercise jurisdiction over suits against foreign states in deference to the Executive Branch's judgment about the foreign-policy consequences of such suits. *See Verlinden*, 461 U.S. at 486. After the State Department adopted a "restrictive" theory of sovereign immunity in 1952—limiting immunity to "suits involving the foreign sovereign's public acts"—"initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department." *Id.* at 487

This process proved unwieldy. Accordingly, on the recommendation of the State Department and the Justice Department, Congress passed the FSIA in 1976. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (Sept. 9, 1976) (1976 House Report). The FSIA elevated foreign-sovereign immunity to a jurisdictional doctrine "in order to free the Government from [] case-by-case diplomatic pressures" and "to clarify the governing standards." *Verlinden*, 461 U.S. at 488. The new jurisdictional statute imposed on courts the obligation to ensure that the FSIA's requirements

were met at "the threshold of every action." *Id.* at 493-494.

The FSIA is now "the sole basis for obtaining jurisdiction over a foreign state in our courts," *Amerada Hess*, 488 U.S. at 434—a point this Court has emphasized repeatedly. *See, e.g.*, *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 394 (2016) (*OBB Personenverkehr*); *Samantar* v. *Yousuf*, 560 U.S. 305, 314 (2010); *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007) (*Permanent Mission*); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 699 (2004); *Nelson*, 507 U.S. at 355; *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607, 611 (1992).

2. By enacting the FSIA, including the statute's presumption of immunity, Congress recognized "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." *Verlinden*, 461 U.S. at 489 (quoting 1976 House Report 32). Congress therefore made the Act's provisions "comprehensive," "substantive," and "detailed." *Id.* at 488, 494, 498. It adopted international-law norms for state sovereign immunity as the governing standard, codifying "international law at the time of the FSIA's enactment." *Permanent Mission*, 551 U.S. at 199. And it combined disparate jurisdictional elements in atypical ways. Unlike other jurisdictional statutes, the FSIA combines elements of "both statutory subject matter jurisdiction * * * and personal jurisdiction." *Verlinden*, 461 U.S. at 485 n.5. *Compare Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583-584 (1999) (explaining the typical distinctions between subject-matter and personal jurisdiction). "[Section] 1330(b) provides personal jurisdiction wherever subject-matter jurisdiction ex-

ists under subsection (a) and service of process has been made under [Section] 1608." *Verlinden*, 461 U.S. at 485 n.5. The Act's subject-matter provisions in turn borrow from personal-jurisdiction concepts, conferring subject-matter jurisdiction over cases where there is "some form of substantial contact" between the foreign state and the United States, *id.* at 490, or where "the foreign state has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1); 1976 House Report 13.

3. The FSIA's presumption of immunity can be overcome only by satisfying the substantive requirements set forth in 28 U.S.C. §§ 1605-1607 for abrogating foreign-sovereign immunity. *See Verlinden*, 461 U.S. at 488. These statutory exceptions are carefully "carve[d] out" from the Act's "general grant of immunity." *Altmann*, 541 U.S. at 691. They include cases where a "foreign state has waived its immunity," 28 U.S.C. § 1605(a)(1); where "the action is based upon a commercial activity" with a nexus to the United States, *id.* § 1605(a)(2); where "rights in property taken in violation of international law are in issue," and there is a commercial nexus to the United States, *id.* § 1605(a)(3); where "rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue," *id.* § 1605(a)(4); where "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state" that is non-commercial in nature, *id.* § 1605(a)(5); where a private party seeks to enforce an agreement to arbitrate, or confirm an arbitral award, with the requisite nexus to the United States,

id. § 1605(a)(6); where the action is to enforce a maritime lien, *id.* § 1605(b); where the action is to foreclose a preferred mortgage on a maritime vessel, *id.* § 1605(d); where money damages are sought for personal injury or death caused by acts of state-sponsored terrorism, *id.* § 1605A; and where the foreign state has brought suit or intervened, and the defendant asserts specified types of counterclaims, *id.* § 1607 Unless one of these exceptions is satisfied, the court lacks subject-matter jurisdiction under the FSIA, and the claims against the foreign state must be dismissed. *See* 28 U.S.C. § 1330(a); *Nelson*, 507 U.S. at 355; *Verlinden*, 461 U.S. at 489.

The FSIA's exceptions are "central to the Act's functioning." *Altmann*, 541 U.S. at 691. But they exist in a statutory scheme where foreign states are "ordinarily," *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009), and "normally immune from the jurisdiction of federal and state courts," *Verlinden*, 461 U.S. at 488. *See also, e.g.*, *OBB Personenverkehr*, 136 S. Ct. at 394; *Permanent Mission*, 551 U.S. at 197 The standard for assessing jurisdiction over foreign states is therefore demanding. This Court has recognized as much in its decisions interpreting the FSIA. In *Verlinden*, the Court held that "[a]t the threshold of every action in a District Court against a foreign state, * * * the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." 461 U.S. at 493-494; *accord Altmann*, 541 U.S. at 691; *see also* U.S. Cert.-Stage Br. 7-10.

B. This Court Applies A Single Standard To Review Jurisdictional Pleadings Under The FSIA's Exceptions.

1. This Court has put *Verlinden*'s principle into practice on several occasions, each time resolving at the pleading stage whether the complaint alleged facts that, if taken as true, *actually* established the requirements of the relevant FSIA exception. *See OBB Personenverkehr*, 136 S. Ct. at 395-396; *Permanent Mission*, 551 U.S. at 198-199; *Nelson*, 507 U.S. at 358, 363; *Amerada Hess*, 488 U.S. at 439-443.

In *Permanent Mission*, 551 U.S. 193, the Court considered a case involving the immovable-property FSIA exception—a provision worded similarly to the expropriation exception. That exception applies to cases "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). New York had sought a declaration that its tax lien on property owned in the State by the Government of India was valid. 551 U.S. at 195. The question presented was "whether an action seeking a declaration of the validity of a tax lien places 'rights in immovable property * * * in issue.'" *Id.* at 198 (ellipsis in original). On review, and after surveying the relevant New York legal authorities, this Court concluded that the answer was yes: "A tax lien * * * inhibits"—not colorably inhibits, but *actually* inhibits—"one of the quintessential rights of property ownership—the right to convey." *Id.*

2. The H&P plaintiffs have argued that a different standard applies when the substantive requirements of an FSIA exception overlap with the plaintiff's cause of action. *See* Resp. Suppl. Br. 6-9. Yet this Court's prior cases establish that the standard for

reviewing pleadings does not depend on the plaintiff's particular claim for relief. The pleadings must satisfy *all* requirements of the relevant FSIA exception, *even if* courts might have to evaluate the legal sufficiency of allegations common to both jurisdiction and the underlying cause of action.

a. Take *Amerada Hess*, 488 U.S. 428, as an example. In that case, the plaintiffs sued the Argentine Republic "to recover damages for a tort allegedly committed by its armed forces on the high seas in violation of international law." *Id.* at 431. The plaintiffs argued that the FSIA conferred jurisdiction over the case, and that the non-commercial-torts exception, 28 U.S.C. § 1605(a)(5), was "most in point." *Amerada Hess*, 488 U.S. at 439. This Court disagreed. It concluded that the non-commercial-torts exception did not apply because the plaintiffs' injury occurred on the high seas—not in the United States, as required by that exception. *Id.* at 440. And the Court went a step further still. It listed all the potentially applicable FSIA exceptions to sovereign immunity, *including* the expropriation exception. *Id.* at 439. Then, based on its assessment of the pleadings, and without regard to whether any of the jurisdictional requirements overlapped with merits issues, the Court held that "*none* of the enumerated exceptions to the Act apply to the facts of this case." *Id.* at 443 (emphasis added).

The Court also considered and rejected the plaintiffs' argument that they might circumvent the Argentine Republic's sovereign immunity through certain international agreements. *Id.* at 442; *see* 28 U.S.C. § 1604 (foreign-sovereign immunity is "[s]ubject to existing international agreements to which the United States is a party at the time of en-

actment of this Act"). If any of those agreements created private rights of action, the plaintiffs not only would establish jurisdiction over the foreign state, they also would have a claim for relief. There was, therefore, an overlap between the jurisdictional question and a merits issue. Nonetheless, the Court determined on a jurisdictional motion to dismiss that the cited agreements "do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Amerada Hess*, 488 U.S. at 442.

b. In *Nelson*, 507 U.S. 349, the Court applied the same type of analysis to the FSIA's commercial-activity exception, 28 U.S.C. § 1605(a)(2). In that case, plaintiff Nelson had been recruited in the United States to work at a hospital in Saudi Arabia. *Nelson*, 507 U.S. at 352. He alleged that after complaining of various safety defects at the hospital, he was imprisoned and tortured. *Id.* Nelson and his wife sued Saudi Arabia, its state-owned hospital, and the company that had recruited Nelson for various intentional torts, as well as on a theory that the defendants had failed to warn him (in the United States) of the dangers of his employment (in Saudi Arabia). *Id.* at 354. The question presented was whether the plaintiffs' personal-injury suit "resulting from unlawful detention and torture by the Saudi Government" was "based upon" the requisite commercial activity in the United States. *Id.* at 351. The Court concluded it was not.

In reaching its decision, the Court interpreted "based upon" to mean "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357; *see id.* (describing this as the "'gravamen of the complaint'"

(citation omitted)). The question what "would entitle a plaintiff to relief," of course, overlapped with the merits of the underlying claims. But the Court was undeterred by this overlap. It reviewed the plaintiffs' allegations, identified the gravamen of the complaint, and decided whether that core of the complaint was a commercial activity in the United States. *Id.* The Court did not just take the plaintiffs' word for what entitled them to relief; indeed, the Court rejected the plaintiffs' efforts to identify activity taking place in the United States as the purported gravamen of their complaint, reasoning that "those facts alone entitle the [plaintiffs] to nothing under their theory of the case." *Id.* at 358. Thus the Court determined what would *actually* entitle the plaintiffs to relief (assuming the truth of their allegations), and rendered its decision on that basis. *See id.*

The Court was even more hostile to the plaintiffs' failure-to-warn claim. It declined to alter the jurisdictional analysis based on the complaint's inclusion of that particular claim, describing the claim as "merely a semantic ploy." *Id.* at 363. The Court explained: "For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn," improperly giving "jurisdictional significance" to a mere "feint of language." *Id.* In other words, the Court would not allow the plaintiffs to use artful pleading to turn an FSIA exception into the rule. *See id.*

c. The Court confirmed this approach just last Term in *OBB Personenverkehr*, 136 S. Ct. 390. The issue in that case was whether the plaintiff's claims for personal injury resulting from dangerous conditions at a state-owned railroad station in Austria were "based upon" commercial activity in the United

States. *Id.* at 393. The plaintiff bought a ticket for carriage through the railway's agent here, and she contended that the ticket purchase was sufficient to trigger the commercial-activity exception, in part because the railway agent failed to warn her at the time of the sale (in the United States) of the dangerous railway condition (in Austria). *Id.* This Court looked past that contention, examined the allegations of the complaint, and decided whether the purchase of the ticket was the gravamen of the complaint—meaning the source of plaintiff's injury. *Id.*

As in *Amerada Hess* and *Nelson*, the Court's jurisdictional analysis required it to decide issues that overlapped with the plaintiff's causes of action. The Court had to identify the source of the plaintiff's injury and determine the viability of her failure-to-warn claim. And it did so: Just as it had in *Nelson*, the Court "zeroed in" on the acts that "actually injured" the plaintiff. *Id.* at 396. There was "nothing wrongful" about the ticket sale in the United States standing alone, *id.*, and thus no sense in which that single U.S. ticket sale gave rise to the plaintiff's injury. That the plaintiff pleaded a failure-to-warn claim did not change the analysis in the slightest. Because a plaintiff could recast virtually any intentional tort claim as a failure to warn, the Court explained, "any other approach would allow plaintiffs to evade the Act's restrictions through artful pleading." *Id.*

3. Applying the same rule to the expropriation exception, courts evaluating jurisdictional pleadings under that exception should determine whether plaintiffs have *actually* put "in issue" "rights in property taken in violation of international law." 28 U.S.C. § 1605(a)(3). Under *Permanent Mission*, a plaintiff puts "rights in property * * * in issue" when

it pleads the existence of rights in property that are *legally recognized* under the law of the place where the property in issue was located at the time of the taking. And following the logic of *Amerada Hess*, *Nelson*, and *OBB Personenverkehr*, a plaintiff pleads that its property rights were "taken in violation of international law" only when it alleges a taking that *actually* violates customary international law. *See* U.S. Cert.-Stage Br. 7-10 (arguing for same standard). That is, the alleged taking must be a violation "'of a norm that is specific, universal, and obligatory.'" *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004) (citation omitted); *see also, e.g.*, *Simon* v. *Republic of Hung.*, 812 F.3d 127, 145-146 (D.C. Cir. 2016) (applying *Sosa*'s standard for violations of customary international law to the expropriation exception); *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 676 (7th Cir. 2012) (same).

C. The Court's Usual Standard For Reviewing Pleadings Under The FSIA's Exceptions Should Apply To The Expropriation Exception.

It makes sense to apply the same standard for reviewing jurisdictional pleadings to all of the FSIA's exceptions. The same presumption of immunity begins the analysis, *see* 28 U.S.C. § 1604, and all of the exceptions identify the specific circumstances that overcome that presumption, *Nelson*, 507 U.S. at 355. Applying the same standard across the board allows for predictability and ease of administration because the standard does not turn on each plaintiff's cause of action. By contrast, there are good reasons *not* to adopt a different standard for the expropriation exception, just because the plaintiff might plead a

cause of action that overlaps with the statutory requirements for the exception.

First, the jurisdictional inquiry does not necessarily have to overlap with merits issues in expropriation-exception cases. To the extent they overlap in this case, that is solely the product of the H&P plaintiffs' pleading choices. When a case falls within the expropriation exception, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Thus, plaintiffs bringing suit under the expropriation exception do not have to plead "a taking without just compensation in violation of international law" as their cause of action; they may "seek recovery based on garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution." *Simon*, 812 F.3d at 141. In such cases, "the jurisdictional and merits inquiries do not overlap." *Id.*

In light of this fact, if the Court were to adopt the D.C. Circuit's rule—whereby the applicable standard of review turns on the plaintiff's chosen cause of action—the FSIA jurisdictional analysis would turn into a game of "artful pleading." *OBB Personenverkehr*, 136 S. Ct. at 396. The plaintiff's pleading choices would dictate the standard of review, rather than the statute. Such a result would give "jurisdictional significance" to mere "feint of language" in the complaint. *Nelson*, 507 U.S. at 363. And that is precisely what this Court has held should *not* happen. *See OBB Personenverkehr*, 136 S. Ct. at 396-397; *Nelson*, 507 U.S. at 363; *see also infra* Section II.B, pp. 39-41.

Second, the text of the expropriation exception does not allow for a lesser standard of review. The excep-

tion confers jurisdiction only where "rights in property taken in violation of international law *are* in issue." 28 U.S.C. § 1605(a)(3) (emphasis added). It does not allow courts to assert jurisdiction where the specified rights are *colorably* in issue. The demands of the pleading standard therefore must meet the demands of the statute. A standard that does not ensure the expropriation exception's requirements are actually met would clash with the statutory text.

Third and finally, a standard that does not determine whether all elements of the claimed FSIA exception are satisfied at the pleading stage fails to resolve foreign-sovereign immunity at the earliest possible stage of the litigation. That result is contrary to this Court's instruction that courts "must" ensure that the FSIA's requirements are met at "the threshold of every action." *Verlinden*, 461 U.S. at 493-494.

After all, the FSIA is intended to give foreign states "some protection from the inconvenience of suit." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003) (*Dole Food*). Immunity is "not just a defense to liability on the merits"; it is "immunity from trial and the attendant burdens of litigation." *Phoenix Consulting, Inc.* v. *Republic of Ang.*, 216 F.3d 36, 39 (D.C. Cir. 2000) (citation and quotation marks omitted). "In order to preserve the full scope of that immunity, the district court must make the critical preliminary determination of its own jurisdiction as early in the litigation as possible; to defer the question is to frustrate the significance and benefit of entitlement to immunity from suit." *Id.* (citation and quotation marks omitted). Therefore, at the pleading stage, "the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to

immunity invoked by the plaintiff." *Id.* at 40 (citing, among other cases, *Nelson*, 507 U.S. at 351, 361).

II. THE FEDERAL-QUESTION PLEADING STANDARD DOES NOT APPLY TO THE EXPROPRIATION EXCEPTION.

The D.C. Circuit did not decide whether the H&P plaintiffs had cleared the FSIA's jurisdictional bar by actually pleading rights in property taken in violation of international law. Instead the court applied a standard that is, in the panel majority's own words, "exceptionally low." J.A. 178. The court will dismiss "on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property * * * in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" *Id.* (ellipsis in original) (quoting *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 943 (D.C. Cir. 2008) (*Agudas*)). That standard for dismissal, which is derived from the standard for reviewing jurisdictional pleadings under 28 U.S.C. § 1331, has no place in an FSIA analysis. *See* U.S. Cert.-Stage Br. 10-13.

A. The Expropriation Exception Does Not Create A Standard "Analogous" To The Federal-Question Statute.

1. The "wholly insubstantial and frivolous" standard for reviewing jurisdictional pleadings comes from *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). The plaintiffs in *Bell* sued federal officials for an alleged violation of their Fourth and Fifth Amendment rights. *Id.* at 679. The trial court had dismissed the case on jurisdictional grounds, concluding that the plaintiffs' claims did not "arise[ ] under the Constitution or laws of the United States" as required by the

federal-question statute. *Id.* at 680 (quoting former 28 U.S.C. § 41(1), now 28 U.S.C. § 1331). The court of appeals affirmed. This Court reversed. *Id.* at 685. It explained that a suit arises under federal law if the complaint "is drawn so as to claim a right to recover under the Constitution and laws of the United States," *id.* at 681—*unless* "the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous," *id.* at 682-683.[2]

2. a. The court of appeals below interpreted the expropriation exception to import the *Bell* standard for pleading jurisdiction, citing *Agudas*, 528 F.3d 934. *See* J.A. 178. *Agudas*, in turn, interpreted the expropriation exception as a bifurcated standard with two categories of requirements. *See* 528 F.3d at 940-942. According to the two-judge majority in that case, the first category is made up of "purely factual predicates independent of the plaintiff's claim"; namely, that there must be a connection between the alleged taking and specified commercial activity in the United States. *Id.* at 941. The second category is the requirement that "rights in property taken in violation of international law are in issue," 28 U.S.C. § 1605(a)(3)—which, according to the majority, "does not involve jurisdictional facts, but rather concerns what the plaintiff has put 'in issue,' effectively requiring that the plaintiff assert a certain type of

[2] The court of appeals uses the language "'wholly insubstantial *or* frivolous,'" J.A. 178 (emphasis added; citation omitted), whereas this Court uses the language "wholly insubstantial *and* frivolous," *Bell*, 327 U.S. at 682-683 (emphasis added). The difference does not appear to be material.

claim." 528 F.3d at 941. This second category imposes a jurisdictional requirement similar to that in the federal-question statute, the majority reasoned, and therefore the *Bell* standard for reviewing jurisdictional pleadings should apply. *See id.* at 940.

Judge Henderson, concurring in the judgment only, disagreed with the majority's analysis. *Id.* at 955-956 (Henderson, J., concurring in the judgment). In her view, there was no basis to bifurcate the elements of the expropriation exception: "*Any* jurisdictional fact, once challenged, may require the district court to satisfy itself of its jurisdiction." *Id.* at 956.

b. For their part, the H&P plaintiffs' textual defense of the court of appeals' standard appears in a lone footnote of their Brief in Opposition. They appear to adopt the *Agudas* majority's reasoning by broadly contending that the language in Section 1605(a)(3) creates a "standard analogous" to that in Section 1331. Br. in Opp. 26 n.12.

3. a. The H&P plaintiffs and the *Agudas* majority are incorrect. The two statutory standards are not remotely "analogous." The federal-question statute requires only that an action "aris[e] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. It does not define or otherwise limit the rights that must be in issue or the harm that must be alleged. Nor does it speak in terms of violations of law. Given the statute's open-ended language, it makes sense that this Court construed the language to confer jurisdiction when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Bell*, 327 U.S. at 685.

The statute requires only that the complaint raise a substantial federal question. *See, e.g.*, *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (*Grable & Sons*).

The expropriation exception, on the other hand, goes well beyond requiring a complaint to raise a particular type of question. It is one of the Act's specific, substantive, and "detailed federal law standards," *Verlinden*, 461 U.S. at 494, which applies only if "rights in property taken in violation of international law are in issue," 28 U.S.C. § 1605(a)(3). The expropriation exception therefore speaks in terms of a specific type of right ("rights in property"), alleged harm ("taken"), and legal violation ("in violation of international law"). It is not "analogous" to the federal-question statute, at all.

Moreover, if Congress wanted to adopt the federal-question standard for the FSIA's expropriation exception, it easily could have done so. When Congress enacted the FSIA in 1976, the "arising under" standard for jurisdiction under the Constitution had existed for nearly 200 years, and its statutory counterpart for 100 years. *See* U.S. Const. art. III, § 2, cl. 1; Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. The statutory words had a well-understood meaning in the "vast majority of cases." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Tr.*, 463 U.S. 1, 9 (1983). Namely, "[a] suit arises under the law that creates the cause of action." *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). And since at least as early as this Court's 1946 *Bell* decision, the requirements for pleading federal-question jurisdiction have been established. *See* 327 U.S. at 681-683, 685. Thus, for at least thirty years before the FSIA's passage, the test for pleading "arising un-

der" federal-question jurisdiction was well-defined. *See id. Compare Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1571 (2016) (*Merrill Lynch*) (observing that when the Securities Exchange Act was passed in 1934, there was not yet a "well-defined test" for statutory "arising under" jurisdiction).

Yet Congress did not in Section 1605(a)(3) confer jurisdiction over cases *arising under the international law of property takings*. It conferred jurisdiction over cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). This Court should give effect to that distinct choice.

b. The histories and policies of the two statutes also are entirely different, which further counsels against applying the federal-question pleading standard to the expropriation exception. *See Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (identifying the "history and policy" of the federal-question statute as important to its interpretation). We have already recounted the FSIA's history and policy. The Act is the sole basis for obtaining jurisdiction over foreign states; it begins with a presumption of immunity and then creates specific exceptions; it codified international law on state sovereign immunity at the time of its enactment; it was designed to make the legal standards for immunity uniform; and it requires courts to ensure that the Act's detailed requirements are met at the threshold of every action. *See supra* Section I.A, pp. 17-21.

As for federal-question jurisdiction, the first permanent appearance of a statutory grant of original "arising under" federal-question jurisdiction was in

the Judiciary Act of 1875. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470; *see Romero*, 358 U.S. at 363. It was "the 'culmination of a movement *** to strengthen the Federal Government against the states.'" James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. Pa. L. Rev. 639, 645 (1942) (quoting Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* 65 n.34 (1927)); *see also Romero*, 358 U.S. at 368 ("The far-reaching extension of national power resulting from the victory of the North, and the concomitant utilization of federal courts for the vindication of that power in the Reconstruction Era, naturally led to enlarged jurisdiction of the federal courts over federal rights."). The federal-question statute thus codified a "sound division of labor between state and federal courts." *Grable & Sons*, 545 U.S. at 313; *see also Franchise Tax Bd. of Cal.*, 463 U.S. at 8 (the federal-question statute concerns "the interrelation of federal and state authority and the proper management of the federal judicial system").

The prospect that foreign states might be subject to suit in the United States never fit into the equation when the federal-question statute was enacted. That was because, at the time, "the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden*, 461 U.S. at 486. The exclusive concern of the federal-question statute was the state-federal divide. Accordingly, and unlike for questions of sovereign immunity, the point of the federal-question analysis is not to resolve whether *any* court in the country, state or federal, can hear the case. It is simply to answer the question of which one.

Indeed, because of the FSIA's distinct history and function, this Court has held once before, in a different context, that the federal-question statute does not control or inform interpretation of the FSIA. This Court in *Verlinden* reversed a court of appeals' ruling that the FSIA was unconstitutional because Article III's "arising under" jurisdiction purportedly was not broad enough to support jurisdiction over actions by foreign plaintiffs against foreign sovereigns. *Id.* at 485-486. The court of appeals' analysis had involved "heavy reliance" on decisions interpreting 28 U.S.C. § 1331 and applying its well-pleaded complaint rule—a reliance that this Court held was "misplaced" and erroneous. *Verlinden*, 461 U.S. at 495. As this Court explained, the "'well-pleaded complaint' rule * * * provides, for purposes of *statutory* 'arising under' jurisdiction, that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense." *Id.* at 494. That statute-specific rule was not required by Article III, and the Court declined to import it into the FSIA. *See id.* at 494-495 & n.20.

Verlinden thus stands for the proposition that this Court will not automatically incorporate pleading rules from the federal-question statute into the FSIA. And that makes good sense; the FSIA is intended to *displace* other jurisdictional standards for suits against foreign states—not mimic them. *See Amerada Hess*, 488 U.S. at 434, 437-438.

c. Applying the *Bell* standard to FSIA pleadings would be irreconcilable with this Court's decisions interpreting the FSIA's exceptions, as well. *Verlinden* instructs that a "court must satisfy itself that one of the [FSIA's] exceptions applies." 461 U.S. at 494. That is why, in *Permanent Mission*, the Court

concluded that the plaintiff had adequately alleged "rights in property * * * in issue" only after reviewing the relevant law and determining that the allegations of the complaint implicated legally recognized property rights. 551 U.S. at 198-199. It is why, in *Amerada Hess*, the Court concluded that "none of the enumerated exceptions to the Act apply to the facts of this case," 488 U.S. at 443, and further that none of the international agreements cited by the plaintiffs gave rise to any actionable rights, *id.* at 442. It is why, in *Nelson*, the Court decided whether the claimed gravamen of the complaint would actually entitle the plaintiffs to relief. 507 U.S. at 358. And it is why the Court did the same thing in *OBB Personenverkehr*. 136 S. Ct. at 396.

None of these decisions applied *Bell*'s frivolousness standard or used any analysis that could even be characterized as comparable to that standard. *Compare Merrill Lynch*, 136 S. Ct. at 1571 (noting that prior Court decisions had held that the Securities Exchange Act language at issue was "coextensive with our construction of 'arising under' "). The reason: A court applying *Bell* asks only whether the plaintiffs' allegations are minimally *colorable*. *See Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 & n.10 (2006). The FSIA, however, requires a court to "apply the detailed federal law standards set forth in the Act." *Verlinden*, 461 U.S. at 494.

d. *Bell*'s "wholly insubstantial and frivolous" standard also cannot be reconciled with the FSIA's presumption of immunity, which, as we have explained, requires that foreign states are "ordinarily" and "normally" immune from U.S. court's jurisdiction. *Beaty*, 556 U.S. at 851; *Verlinden*, 461 U.S. at 488.

Ordinary and normally in litigation, parties do not make wholly insubstantial and frivolous allegations. Those that do may be sanctioned under Federal Rule of Civil Procedure 11 or courts' inherent authority. *See Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 50 (1991). Unsurprisingly, then, it is a "'rare and exceptional case where the action is clearly frivolous.'" *Primus Auto. Fin. Servs., Inc.* v. *Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (citation omitted). And there's the rub: a pleading standard that ousts a plaintiff in only the "rare and exceptional case," *id.*, is not one that ensures foreign states are "ordinarily" and "normally" immune, *Beaty*, 556 U.S. at 851; *Verlinden*, 461 U.S. at 488. The federal-question statute's pleading standard is therefore fundamentally incompatible with the FSIA's presumption of foreign-sovereign immunity.

B. Applying *Bell* To The Expropriation Exception Would Have Serious Adverse Consequences.

1. Incorporating the *Bell* pleading standard into the FSIA's expropriation exception would create a nest of problems. To begin, the *Bell* frivolousness standard would gut the expropriation exception of any real meaning. The point of the FSIA is to codify "international law at the time of the FSIA's enactment." *Permanent Mission*, 551 U.S. at 199. Congress sensibly limited permissible lawsuits against foreign states to cases where there was established international-law precedent, in light of "'the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area.'" *Verlinden*, 461 U.S. at 489 (quoting 1976 House Report 32). *See generally Permanent*

Mission, 551 U.S. at 200 (looking to "international practice at the time of the FSIA's enactment" to interpret the scope of one of the Act's exceptions). That limitation ensures that domestic courts are not embroiled in cases with potentially devastating foreign-policy consequences—such as those that might recognize property rights that do not exist in the place of the property, or those that adjudicate novel and untested alleged violations of international law. *Cf. Sosa*, 542 U.S. at 728 ("We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.").

Under the *Bell* standard, however, any claim of an unlawful international taking, no matter how untested, establishes jurisdiction under the expropriation exception so long as it is not wholly insubstantial or frivolous. Worse still, the question whether the plaintiff has *actually* pleaded that its rights in property were taken in violation of international law might never be answered. If, with its international-takings cause of action, the plaintiff joins other "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution," *Simon*, 812 F.3d at 141, the Court could reach the merits on those claims without further considering whether there is any actual taking in violation of international law. This would render the expropriation exception a hollow and meaningless provision.

2. The ill fit of the court of appeals' standard is made even more apparent by comparing this case and *Simon*, 812 F.3d 127 The plaintiffs in this case

pleaded as a cause of action that their property was taken in violation of international law. J.A. 103-104. H&P-V alleged that "Venezuela has unreasonably discriminated against it on the basis of its sole shareholder's nationality," J.A. 180, and H&P-IDC alleged that Venezuela's expropriation of its subsidiary's property resulted in "a total loss of control over its subsidiary," J.A. 187. The court of appeals concluded that both plaintiffs had sufficiently pleaded jurisdiction under the expropriation exception because their pleadings were not wholly insubstantial or frivolous. J.A. 182, 187

The plaintiffs in *Simon* brought suit under the FSIA's expropriation exception against Hungary and its national railway for property losses during the Holocaust. 812 F.3d at 132. The district court dismissed the case for lack of subject-matter jurisdiction, *id.* at 134, and the D.C. Circuit reversed in relevant part, *id.* at 151. Even though the international-law violation in issue was "genocide," the court nevertheless concluded "there is no occasion to apply the 'exceptionally low bar' of non-frivolousness at the jurisdictional stage." *Id.* at 141. This was because, unlike in "prior cases," "the plaintiffs' claim on the merits [wa]s not an expropriation claim asserting a taking without just compensation in violation of international law"; instead, the plaintiffs sought "recovery based on garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution." *Id.* Because "the jurisdictional and merits inquiries do not overlap," the court required "more than merely a non-frivolous argument"; it "assess[ed] whether the plaintiffs' allegations satisfy the jurisdictional standard." *Id.*

In other words, in a case of *genocide*, where the plaintiffs happened not to plead a cause of action for a taking in violation of international law, the D.C. Circuit reviewed the pleadings using a standard "'similar to that of Rule 12(b)(6).'" *Id.* at 148 (citation omitted). Yet where plaintiffs allege mere discrimination, so long as they have pleaded an affirmative claim for a taking in violation of international law, their complaint will be dismissed only if the pleadings are "'wholly insubstantial or frivolous.'" J.A. 178 (citation omitted). The D.C. Circuit thus has provided a blueprint for future plaintiffs to avoid jurisdictional dismissals—and potentially the need to ever demonstrate an actual taking in violation of international-law. The plaintiffs need only recite the expropriation exception's statutory language as one of their causes of action.

This result is contrary to this Court's warning that the FSIA should not be construed to "allow plaintiffs to evade the Act's restrictions through artful pleading." *OBB Personenverkehr*, 136 S. Ct. at 396. It gives "jurisdictional significance to [a] feint of language" and allows the jurisdictional pleading standard under the expropriation exception to turn on "merely a semantic ploy." *Nelson*, 507 U.S. at 363. The D.C. Circuit's approach defeats the entire point of sovereign immunity, reducing the FSIA's jurisdictional limitations to "a useless drafting rule" that "is simple for plaintiffs to avoid." *Merrill Lynch*, 136 S. Ct. at 1574-1575.

3. Applying *Bell* to the FSIA's expropriation exception would also undermine the FSIA's purpose. Under the D.C. Circuit's rule, once the plaintiff passes the "exceptionally low" non-frivolousness hurdle, J.A. 178, the foreign state is immediately subject to

full-blown discovery and litigation on the merits. The *Bell* standard thus precludes a court from deciding as a jurisdictional matter whether a plaintiff has alleged an actual violation of international law, or whether actual property rights are in issue, before submitting the foreign state to the full burdens of merits litigation. This renders the presumption of immunity largely meaningless. As a result, the FSIA does little to give foreign states the "protection from the inconvenience of suit" to which the statute entitles them. *Dole Food*, 538 U.S. at 479.

This result cannot be squared with the historical context of the FSIA's enactment. Aside from codifying the "restrictive theory of sovereign immunity," which confers immunity on foreign states for "suits involving the foreign sovereign's public acts," the Act did nothing to *diminish* the immunity afforded to foreign states. *Verlinden*, 461 U.S. at 487, 488. To the contrary, "[a] foreign state is *normally immune* from the jurisdiction of federal and state courts, 28 U.S.C. § 1604, subject to a set of exceptions specified in [Sections] 1605 and 1607." *Id.* at 488 (emphasis added).

The court of appeals' rule, however, has the consequence of affording *less* protection to foreign states at the pleading stage than existed before the FSIA. This is because, in addition to requiring that "rights in property taken in violation of international law are in issue," the expropriation exception requires that there be a commercial nexus with the United States—a requirement independent of any cause of action a plaintiff might allege under the exception. 28 U.S.C. § 1605(a)(3); *see Agudas*, 528 F.3d at 941 (describing the nexus requirement as an independent jurisdictional prerequisite). There are often disputed

factual issues concerning the nexus prong. *See, e.g.*, *Fischer* v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847, 854 (7th Cir. 2015) ("we remanded for jurisdictional discovery on whether the railway meets the nexus requirements"); *Abelesz*, 692 F.3d at 686 ("We thus remand that issue to the district court with instructions to allow jurisdictional discovery on the issue of the national railway's U.S. commercial activity."); *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019, 1024 (9th Cir. 2010) ("The district court allowed Cassirer to conduct jurisdictional discovery into the Foundation's commercial activity in the United States."). *Cf. Simon*, 812 F.3d at 147 (noting that the court was not foreclosing "any factual challenges by the Hungarian defendant" under the nexus requirement). And because the nexus requirement is jurisdictional, these issues must be resolved—often following jurisdictional discovery—before a court can proceed to the merits. *See Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

That would not have been the necessary result before the FSIA. Because foreign sovereign immunity was not jurisdictional, a court could have dismissed a case like this on the pleadings under Federal Rule of Civil Procedure 12(b)(6) for failure to state an international-takings claim. Not so now. Under the court of appeals' view, a plaintiff need only plead an international-takings claim that is not wholly insubstantial or frivolous to subject the foreign state to the burdens of jurisdictional discovery on the nexus requirement. Foreign states then must either litigate factual issues or abandon their factual jurisdictional challenges—even though the complaint on its face would be insufficient to establish jurisdiction had the

court decided whether rights in property taken in violation of international law were actually in issue. To quote the D.C. Circuit: "It would be bizarre if an assertion of immunity worked to increase litigation costs via jurisdictional discovery, to the neglect of swifter routes to dismissal." *In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998).

C. This Case Shows Why The Court Of Appeals' Standard Is Wrong.

The case offers a prime example why *Bell* should not govern courts' review of expropriation-exception pleadings. Despite the fact that the H&P plaintiffs failed to plead legally recognized property rights or a taking actually recognized as a violation of international law, the court of appeals allowed this case to go forward, and the district court compelled Venezuela to participate in discovery.

The court of appeals could have dismissed H&P-V's claim by applying the established, and bright-line, domestic-takings rule. Pursuant to that rule, "a foreign sovereign's expropriation of its own national's property does not violate international law." J.A. 179 (citing *United States* v. *Belmont*, 301 U.S. 324, 332 (1937)); *see also Case Concerning Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belgium* v. *Spain), Judgment*, 1970 I.C.J. 3, 44 ¶ 78 (Feb. 5, 1970) (*Barcelona Traction*) (recognizing that a corporation has "no remedy in international law" against its state of incorporation, even if it believes its "rights are not adequately protected"); U.S. Cert.-Stage Br. 18-19 (acknowledging same). Instead, invoking a single pre-FSIA decision never before applied to the FSIA, *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd on*

other grounds, 376 U.S. 398 (1964), the court declined to dismiss. According to the court, *Sabbatino* showed that H&P-V's claim—that there was an exception to the domestic-takings rule when the taking is allegedly motivated by "discrimination" against the foreign parent of a domestic corporation—was not inescapably frivolous. J.A. 180.

The court of appeals also could have dismissed H&P-IDC's claim for damages resulting from the expropriation of its subsidiary H&P-V's property on the internationally recognized and bright-line principle that, "[s]o long as the company is in existence the shareholder has no right to the corporate assets." *Barcelona Traction*, 1970 I.C.J. at 34 ¶ 41; *see also Hausman* v. *Buckley*, 299 F.2d 696, 698 n.5 (2d Cir. 1962) ("under Venezuelan law stockholders have no right to enforce any claim in favor of their corporation against officers, directors, or third parties"); 9 William Meade Fletcher, *Fletcher on Corporations* § 4231, at 57 (rev. 2008) ("The corporation, and it alone, may sue to recover property of the corporation or to recover damages for injuries done to it."). But rather than apply that easily administrable rule, the court declined to dismiss H&P-IDC's claims, on the basis of a vacated due-process decision purporting to hold that "corporate ownership aside, shareholders may have rights in corporate property." J.A. 185 (discussing *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985)). The end result: H&P-IDC was found to have put its rights in issue in a non-frivolous way because it had pleaded "a total loss of control over its subsidiary," J.A. 187—even though H&P-V continues to exist, is a

party to this case, and has asserted its own claims against PDVSA and Petróleo.

Finally, had the court of appeals dismissed the complaint on either of the above-identified purely legal grounds, the parties would not have had to litigate factual issues and discovery disputes. Following the court of appeals' remand to the district court, the H&P plaintiffs argued, for the most part successfully, that because Venezuela's "purely legal claims for dismissal based on sovereign immunity" had "been rejected," they were entitled to sweeping discovery from PDVSA and Petróleo concerning the factual bases for their threshold defenses. Pls.' Mem. of Points & Auths., Second Mot. to Compel 1, 11-cv-1735 Docket Entry No. 81 (Jan. 20, 2016). The H&P plaintiffs also asked the district court to compel the Republic to participate in discovery. *Id.* at 43-44. Again and again, the H&P plaintiffs repeated, this discovery was justified because of "the D.C. Circuit's refusal to dismiss the expropriation claims." *Id.* at 44.[3] The H&P plaintiffs' gambit largely worked. The

---

[3] Plaintiffs' requests were sweeping, including but not limited to demands for "discovery regarding the PDVSA Defendants' purported legal rights, under Venezuelan law, over the expropriated property," Pls.' Mem. of Points & Auths., Second Mot. to Compel 2, 11-cv-1735 Docket Entry No. 81 (Jan. 20, 2016); "the PDVSA Defendants' exercise of power, influence, or practical control over the expropriated property," *id.* at 3; "the identity of the PDVSA officials who exercise influence over the expropriated property, minutes of board meetings that relate to the expropriated property, and documents and information relating to the PDVSA Defendants' influence or control over the expropriated property," *id.*; information on whether a non-party PDVSA-related entity "should be considered the agent or alter ego of the PDVSA Defendants," *id.* at 4; "documents relating to

district court granted the H&P plaintiffs' motion in part, ordered PDVSA and Petróleo to turn over a significant amount of discovery, and directed the Republic to participate in discovery as well. Order & Mem. Op., 11-cv-1735 Docket Entry Nos. 113, 114 (May 13, 2016). In other words, because the H&P plaintiffs pleaded a supposedly non-frivolous basis for jurisdiction under the expropriation exception, they were entitled to propound burdensome discovery requests on Venezuela. This is the inevitable result of the D.C. Circuit's unduly lax pleading standard, and it is among the many reasons why it should be rejected.

CONCLUSION

This Court has a "deeply felt and traditional reluctance *** to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). The court of appeals' incorporation of the *Bell* pleading standard into the expropriation exception is just that type of broad

---

the acquisition, sale, transfer, or designation of any rights, privileges, duties, or obligations concerning the expropriated property," *id.* at 18; "information about the circumstances of" several non-party PDVSA-related entities' "creation" and "Venezuela's involvement in their creation," *id.* at 26-27; "the financial relationships among the entities," "periodic financial reports," and "financial statements," *id.* at 31-32; "information about financial support flowing between [a non-party PDVSA-related entity] and Venezuela," *id.* at 37; "discovery regarding Venezuela's involvement with the expropriated property," *id.* at 38; "communications from Venezuela concerning management/operation" of non-party PDVSA-related entities," *id.*; and "policies and procedures related to management" of those entities, *id.*

reading—and of a statute that Congress carefully calibrated to balance sensitive foreign-policy interests, no less. Under the correct pleading standard, this case should have been dismissed.

The decision below should be reversed. Alternatively, the judgment should be vacated and the case remanded with instructions that the court of appeals apply the correct standard.

Respectfully submitted,

JOSEPH D. PIZZURRO
ROBERT B. GARCÍA
KEVIN A. MEEHAN
JUAN O. PERLA
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178

BRUCE D. OAKLEY
Counsel of Record
HOGAN LOVELLS US LLP
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

WILLIAM L. MONTS, III
CATHERINE E. STETSON
MARY HELEN WIMBERLY
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Petitioners

AUGUST 19, 2016

STATUTORY ADDENDUM

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which

the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen

only of the same State as the infant or incompetent.

* * *

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1391. Venue generally

* * *

(f) Civil actions against a foreign state—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

* * *

28 U.S.C. § 1441. Removal of civil actions

* * *

(d) Actions against foreign States.—Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * *

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under

international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c)

and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an

agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign

state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which

maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall

thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had

the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.—

(1) In general.—

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies

that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the

cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.—

(1) No immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft

sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.—The court shall hear a claim under this section if—

(A) (i) (I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of

terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to

arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.—

(1) In general.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.—

(1) In general.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. § 1606. Extent of Liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like

circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign

state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United

States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal

receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall

not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having

determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f) (1) (A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22

U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2) (A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign

state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.—

(1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A,

and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under

section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

No. 15-423

IN THE

Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
AND PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
AND HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
BLAKE C. ROBERTS
MOLLY M. JENNINGS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

QUESTION PRESENTED

Whether jurisdiction under the expropriation exception of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(3), is established where the required commercial-activity nexus to the United States is present and the complaint puts in issue a substantial claim that rights in property have been taken in violation of international law.

CORPORATE DISCLOSURE STATEMENT

Helmerich & Payne International Drilling Company is a wholly owned subsidiary of Helmerich & Payne, Inc. Blackrock, a publicly traded company, owns approximately 10 percent of the stock of Helmerich & Payne, Inc.

Helmerich & Payne de Venezuela, C.A. is a wholly owned subsidiary of Helmerich & Payne International Drilling Company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 3

A. Respondents' Venezuelan Business 3

B. The Expropriation 5

C. Proceedings Below 7

SUMMARY OF ARGUMENT 13

ARGUMENT 15

I. JURISDICTION IS NOT DEFEATED BY THE POSSIBILITY A COMPLAINT MIGHT FAIL TO STATE A CLAIM 15

A. Subject-Matter Jurisdiction Does Not Turn On The Merits 15

B. The *Bell* Rule Applies In A Wide Range Of Contexts 19

1. Sherman Act 20

2. Bankruptcy 21

3. Criminal law 21

4. Admiralty 23

5. Section 1343(3) 23

6. Securities Exchange Act 25

7. Tucker Act 25

TABLE OF CONTENTS—Continued

Page

II. THE "NORMAL PRACTICE" APPLIES TO THE EXPROPRIATION EXCEPTION 27

A. The FSIA's Text Requires Plaintiffs To Place "In Issue" A Particular Type Of Claim 28

B. Congress Enacted The Expropriation Exception To Authorize U.S. Courts To Decide Whether Property Was Taken In Violation Of International Law 32

C. The FSIA's Structure Confirms That The Expropriation Exception Applies Where The Plaintiff Has Asserted A Colorable Expropriation Claim 37

III. ABANDONING *BELL* WOULD COMPLICATE FSIA LITIGATION AND UNDERMINE FSIA POLICIES 44

A. Petitioners' Rule Would Frontload The Burdens Of Litigation Into The Threshold Phase 44

B. Abandoning *Bell* Would Serve No Other Policy 51

CONCLUSION 55

TABLE OF AUTHORITIES

CASES

Page(s)

Aerolineas Argentinas v. *United States*, 77 F.3d 1564 (Fed. Cir. 1996) 26

Agudas Chasidei Chabad v. *Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) 10, 28

Alfred Dunhill of London, Inc. v. *Republic of Cuba*, 425 U.S. 682 (1976) 32, 33

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 18, 19, 20, 43, 47

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 40, 41

Aurora City v. *West*, 74 U.S. (7 Wall.) 82 (1868) 29

Baker v. *Carr*, 369 U.S. 186 (1962) 24

Banco Nacional de Cuba v. *Farr*, 383 F.2d 166 (2d Cir. 1967) 10

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 45

Banco Nacional de Cuba v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962) 10

Barcelona Traction, Light & Power Co. (Belgium v. *Spain)*, 1970 I.C.J. 3 (Feb. 5) 11

Bates v. *Bodie*, 245 U.S. 520 (1918) 29

Bell v. *Hood*, 327 U.S. 678 (1946) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Best Medical Belgium, Inc. v. *Kingdom of Belgium*, 913 F. Supp. 2d 230 (E.D. Va. 2012) 52

Binderup v. *Pathe Exchange, Inc.*, 263 U.S. 291 (1923) 20

Bray v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) 24

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 43

Chittenden v. *United States*, 126 Fed. Cl. 251 (2016) 26

Clay v. *United States*, 537 U.S. 522 (2003) 27

Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 11, 27

Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998) 25, 26

Engage Learning, Inc. v. *Salazar*, 660 F.3d 1346 (Fed. Cir. 2011) 26

Excelsior Wooden Pipe Co. v. *Pacific Bridge Co.*, 185 U.S. 282 (1902) 19

Ezeiruaku v. *Bull*, 617 F. App'x 179 (3d Cir. 2015) 52

The Fair v. *Kohler Die & Specialty Co.*, 228 U.S. 22 (1913) 17, 19

First National Bank of Denver v. *Klug*, 186 U.S. 202 (1902) 21

Flanders v. *Coleman*, 250 U.S. 223 (1919) 21

TABLE OF AUTHORITIES—Continued

Page(s)

Geneva Furniture Manufacturing Co. v. *S. Karpen & Bros.*, 238 U.S. 254 (1915) 17, 18, 19

Hagans v. *Lavine*, 415 U.S. 528 (1974) 17, 24, 28

Hart v. *B.F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923) 17

Helmerich & Payne International Drilling Co. v. *Bolivarian Republic of Venezuela*, 2016 WL 2771117 (D.D.C. May 13, 2016) 49

Henderson ex rel. Henderson v. *Shinseki*, 562 U.S. 428 (2011) 18, 19

Holloway v. *Schweiker*, 724 F.2d 1102 (4th Cir. 1984) 51

Huntington v. *Laidley*, 176 U.S. 668 (1900) 17

Illinois Central Railroad Co. v. *Adams*, 180 U.S. 28 (1901) 19

In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998) 49

In re Republic of Philippines, 309 F.3d 1143 (9th Cir. 2002) 30

Intelsat Global Sales & Marketing, Ltd. v. *Community of Yugoslav Posts Telegraphs & Telephones*, 534 F. Supp. 2d 32 (D.D.C. 2008) 48

Jerome B. Grubart v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) 1, 19, 23, 40

John Doe Co. v. *United States*, 350 F.3d 299 (2d Cir. 2003) 30

TABLE OF AUTHORITIES—Continued

Page(s)

Johnson v. *Jones*, 515 U.S. 304 (1995) 48

Kilburn v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004) 47

Lamar v. *United States*, 240 U.S. 60 (1916) 21, 22

Lee v. *Taipei Economic & Cultural Representative Office*, 716 F. Supp. 2d 626 (S.D. Tex. 2009) 49

Local Division 732, Amalgamated Transit Union v. *Metropolitan Atlanta Rapid Transit Authority*, 667 F.2d 1327 (11th Cir. 1982) 52

Louie v. *United States*, 254 U.S. 548 (1921) 22

Louisville & Nashville Railroad Co. v. *Rice*, 247 U.S. 201 (1918) 19

McKesson Corp. v. *Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012) 48

Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Manning*, 136 S. Ct. 1562 (2016) 2, 17, 19

Moden v. *United States*, 404 F.3d 1335 (Fed. Cir. 2005) 26

Montana v. *United States*, 440 U.S. 147 (1979) 29

Morrison v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010) 18, 25, 26, 42

Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 (1977) 24

Musacchio v. *United States*, 136 S. Ct. 709 (2016) 29

TABLE OF AUTHORITIES—Continued

Page(s)

OBB Personenverkehr AG v. *Sachs*, 136 S. Ct. 390 (2016) 40, 42

Osborn v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) 16, 17

Permanent Mission of India v. *City of New York*, 551 U.S. 193 (2007) 12, 31, 32, 42, 43, 51

Phoenix Consulting, Inc. v. *Republic of Angola*, 216 F.3d 36 (D.C. Cir. 2000) 8, 44, 45, 46, 48

Powerex Corp. v. *Reliant Energy Services, Inc.*, 551 U.S. 224 (2007) 27, 54

Ralston Steel Corp. v. *United States*, 340 F.2d 663 (Ct. Cl. 1965) 26

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 33, 39, 54

Republic of Iraq v. *Beaty*, 556 U.S. 848 (2009) 44

Roberts v. *Galen of Virginia, Inc.*, 525 U.S. 249 (1999) 55

Romero v. *International Terminal Operating Co.*, 358 U.S. 354 (1959) 23

Ruhrgas AG v. *Marathon Oil Co.*, 526 U.S. 574 (1999) 17, 18, 50

San Remo Hotel, L.P. v. *City & County of San Francisco*, 545 U.S. 323 (2005) 29

Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 40, 51

TABLE OF AUTHORITIES—Continued

Page(s)

Shapiro v. *McManus*, 136 S. Ct. 450 (2015) 16

Simmons v. *South Carolina*, 512 U.S. 154 (1994) 29

Simon v. *Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) 51

Sisson v. *Ruby*, 497 U.S. 358 (1990) 2, 17, 18, 19, 23

Southern Pacific Railroad Co. v. *United States*, 168 U.S. 1 (1897) 29

Steel Co. v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) ..... *passim*

Stellwagen v. *Clum*, 245 U.S. 605 (1918) 21

Swafford v. *Templeton*, 185 U.S. 487 (1902) 17

United States v. *Mitchell*, 463 U.S. 206 (1983) 25, 26

United States v. *Williams*, 341 U.S. 58 (1951) 22, 23, 26

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) ..... *passim*

Victory Transport Inc. v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964) 33

Williams v. *Aztar Indiana Gaming Corp.*, 351 F.3d 294 (7th Cir. 2003) 51

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

Helmerich & Payne International Drilling Co. v. *Bolivarian Republic of Venezuela*, No. 15-698 (U.S.) 8

Permanent Mission of India v. *City of New York*, No. 06-134 (U.S.) 31, 42

STATUTES AND RULES

15 U.S.C. § 78aa 25

18 U.S.C. § 3231 22

22 U.S.C. § 2370 34

28 U.S.C.
§ 1330 8
§ 1331 ..... 13, 16, 19, 38
§ 1333 23
§ 1343 ..... 23, 24
§ 1491 25
§ 1603 24
§ 1605 ..... *passim*
§ 1605A 38
§ 1607 38
§ 1610 ..... 32, 37

42 U.S.C.
§ 1983 24
§ 1985 24

Judicial Code of Mar. 3, 1911, Pub. L. No. 61-475, 36 Stat. 1087 21

Sherman Anti-Trust Act, 26 Stat. 209 (July 2, 1890) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Fed. R. Civ. P.
Rule 12 ..... 8, 25, 50
Rule 26 49

LEGISLATIVE MATERIALS

H.R. Rep. No. 94-541 (1975) 35

H.R. Rep. No. 94-1487 (1976) 30, 33, 37, 44, 48

S. Rep. No. 93-676 (1974) 35

S. Rep. No. 94-673 (1976) 35

Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary, 93d Cong. (1973) 30, 36

House Committee on Foreign Affairs, 88th Cong., *Report on Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century* (Comm. Print 1963), 2 I.L.M. 1066 34

110 Cong. Rec.
A5153 (1964) 34
19513 (1964) 34

OTHER AUTHORITIES

13A Fed. Proc. § 36:458 (Sept. 2016) 44

Black's Law Dictionary (4th ed. 1968) 29

Brownlie, Ian, *Principles of Public International Law* (7th ed. 2008) 36

TABLE OF AUTHORITIES—Continued

Page(s)

Comment, *American Oil Investors' Access to Domestic Courts in Foreign Nationalization Disputes*, 123 U. Pa. L. Rev. 610 (1975) 35, 36

Garner, Bryan A., *A Dictionary of Modern Legal Usage* (2d ed. 1995) 28

Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952), *reproduced in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976) 32, 33

Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666 (1966) 34, 36

Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607 (1962) 36

Restatement (Third) of Foreign Relations Law (1987) 10, 11

Shapiro, Stephen M., et al., *Supreme Court Practice* (10th ed. 2013) 55

U.S. Department of Justice, *Office of Foreign Litigation*, https://www.justice.gov/civil/office-foreign-litigation (last updated Oct. 20, 2014) 53

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Department of State, Bureau of Intelligence and Research, *Nationalization, Expropriation, and Other Takings of United States and Certain Foreign Property since 1960*, Research Study RECS-14 (Nov. 30, 1971), 11 I.L.M. 84 (1972) 34, 35

U.S. Department of State, *Digest of United States Practice in International Law* (1989-2015 eds.) 53

U.S. Department of State, *Statement by the Department of State on Policy on "Hot" Libyan Oil*, 13 I.L.M. 767 (1974) 35, 36

Vandevelde, Kenneth J., *Bilateral Investment Treaties* (2010) 36

White House Press Release, *U.S. Statement on Economic Assistance and Investment in Developing Nations* (Jan. 19, 1972), 11 I.L.M. 239 (1972) 35

IN THE

Supreme Court of the United States

No. 15-423

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
AND PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR RESPONDENTS

INTRODUCTION

This Court has long held that where a statute confers subject-matter jurisdiction over a particular class of cases, the assertion of a substantial claim within that class establishes jurisdiction for the court to decide the claim one way or the other. The possibility that the allegations might not entitle the plaintiff to relief does not defeat jurisdiction. That rule was "well settled" when the Court decided *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). It describes the Court's "[n]ormal practice" across a range of contexts. *Jerome B. Grubart* v. *Great*

Lakes Dredge & Dock Co., 513 U.S. 527, 537 (1995). And it derives not from the "particular phrasing" of any one statute, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1570 (2016), but from the very "nature of the jurisdictional inquiry," *Sisson* v. *Ruby*, 497 U.S. 358, 365 (1990), and the problems that would follow if jurisdiction depended on the merits.

Petitioners urge the Court to abandon that rule in cases brought under the expropriation exception of the Foreign Sovereign Immunities Act, which authorizes courts to decide certain claims against foreign sovereigns where "rights in property taken in violation of international law are in issue." Respondents asserted such a claim here, seeking redress for the unlawful expropriation of their entire U.S.-owned drilling business in Venezuela—an expropriation that was motivated by the discriminatory animus of Venezuela's Chávez regime toward the United States and U.S.-owned companies, and for which respondents have never received one penny of the compensation required by international law.

Petitioners contested the district court's jurisdiction on the ground that respondents were not legally entitled to relief because the allegations did not show a taking of their rights in property in violation of international law. Applying *Bell*, the court of appeals correctly held that petitioners' merits-based arguments could not defeat jurisdiction so long as respondents' claims were substantial—as indeed they are.

In urging the Court to disregard *Bell*, petitioners emphasize that the FSIA prescribes substantive standards defining foreign sovereigns' immunity from suit, and that courts must determine at the outset whether those standards are "actually" met. Those propositions

are undoubtedly correct. But they only beg the question: What substantive standards does the statute impose? The text, structure, history, and purposes of the FSIA dictate that jurisdiction lies under the expropriation exception where the complaint (1) actually satisfies detailed territorial and commercial nexus requirements, and (2) actually puts "in issue" a claim that the plaintiff's rights in property have been taken in violation of international law. The latter is precisely the type of inquiry *Bell* governs, and nothing in the FSIA displaces that rule that the possibility a claim might fail does not defeat the court's jurisdiction to decide it.

Petitioners' view—that a court has no authority to decide whether rights in property were taken in violation of international law unless it first concludes that rights in property were taken in violation of international law—would not shield sovereigns from any burdens of litigation. It would simply frontload those burdens into the jurisdictional stage, including potentially broad discovery into the factual basis of the claim. This Court has consistently rejected similar approaches to federal jurisdiction. It should do so again here.

STATEMENT

A. Respondents' Venezuelan Business[1]

Respondent Helmerich & Payne International Drilling Company ("H&P-IDC") is a Delaware corporation based in Tulsa, Oklahoma. For more than five decades, H&P-IDC ran a successful drilling business in Venezuela, working through a wholly owned subsidiary

---

[1] The Statement relies on the complaint's allegations, which the parties agreed must be accepted as true for present purposes. JA132-133.

—most recently, respondent Helmerich & Payne de Venezuela ("H&P-V").

H&P-IDC conducted its Venezuelan operations from the United States by supplying H&P-V with powerful land-based drilling rigs and equipment. JA61. From the United States, H&P-IDC provided continuous technical and administrative guidance and made all significant strategic and operational decisions, such as whether to transfer equipment between regions and whether to enter into particular contracts. JA92-93. Although H&P-V is incorporated in Venezuela, the Venezuelan government designated and treated it as a "FOREIGN COMPANY at all relevant legal effects" due to its 100% U.S. ownership. JA83-84.

After Venezuela nationalized its oil industry in the 1970s, H&P-V began providing services—eventually, exclusively—to Venezuela's state-owned oil companies, petitioners Petróleos de Venezuela, S.A. and PDVSA Petróleo, S.A. (together, "PDVSA"). JA59-60, 125. Both entities are agencies or instrumentalities of petitioner Venezuela. JA126. H&P-V worked under recurring contracts with PDVSA. The most recent contracts were signed in 2007. JA65, 126-127, 171-172.

Shortly after executing the 2007 contracts, PDVSA fell substantially behind on payments. JA69, 128-129, 172. Despite H&P-V's complete performance, PDVSA failed to pay tens of millions of dollars due under the contracts. JA172-173. PDVSA acknowledged its debt and promised to pay, but never did. JA69-70, 129. In 2009, H&P-V told PDVSA it would not extend the contracts until PDVSA met its obligations. JA128-129. As the term of each contract ended, H&P-V disassembled its rigs and stacked its equipment in its Venezuelan yards pending payment. *Id.*

B. The Expropriation

PDVSA's refusal to honor its commitments came amid intensifying hostility by the Venezuelan government toward the United States and U.S.-owned companies. JA84-88. As reported by the U.S. State Department, then-President Hugo Chávez "define[d] himself in opposition to the United States, using incendiary rhetoric to insult the U.S. Government and U.S. influence in Latin America." JA86. Venezuela expelled the U.S. ambassador in 2008 and deepened ties with U.S. adversaries, while senior officials directed vitriolic rhetoric against U.S. companies. JA86, 88. The U.S. Commerce Department reported a campaign of "active discrimination" by the Venezuelan government against American businesses. JA87.

In June 2010, without apparent legal authority, PDVSA employees assisted by armed soldiers of the Venezuelan National Guard blockaded H&P-V's facilities in western Venezuela and similarly seized H&P-V's headquarters in eastern Venezuela a few days later. JA72. Two weeks later, the National Assembly issued a "Bill of Agreement" declaring the "public utility and social interest" of H&P-V's rigs and assets. JA74, 174. President Chávez issued an Expropriation Decree that day, belatedly authorizing the "forcible taking" of H&P-V's rigs and "all the personal and real property and other improvements made by [H&P-V]." JA74, 129-130. The Decree declared H&P-V's property "the unencumbered and unlimited property of PDVSA, S.A., or its designee affiliate, as expropriating entity." JA74.

As the complaint explains in detail, petitioners targeted and seized respondents' business because of the Chávez regime's pervasive anti-American animus. PDVSA and Venezuelan officials stated publicly at the

time that H&P-V was taken because of its U.S. ownership. On June 23, 2010, before the Venezuelan government authorized the expropriation, PDVSA trumpeted its seizure of a U.S.-owned business: "The Bolivarian Government, through [PDVSA] [had] nationalized 11 drilling rigs" belonging to "the company Helmerich & Payne (HP), a U.S. transnational firm." JA73. Two days later, PDVSA boasted about "[t]he nationalization of the oil production drilling rigs from the American contractor H&P" and "reject[ed] statements made by spokesmen of the American empire—traced [sic] in our country by means of the oligarchy." JA74, 85. It declared that the drills would "be operated by PDVSA as a company of all Venezuelans"—no longer the property of an "American company." JA85.

When the National Assembly passed the Bill of Agreement, the President of the Assembly's Committee on Energy and Mines accused opponents of the expropriation of acting "in accordance with the instructions of the [U.S.] Department of State" and trying to "subsidize the big business transnational corporations, so that they can promote what they know best to do, which is war, ... through the large military industry, of the Empire and its allies." JA84. Two days later, Venezuela's oil minister—who also served as PDVSA's president—spoke at a political rally in H&P-V's yard, condemning respondents' "foreign gentlemen investors" and announcing that employees of "this American company" would become employees of PDVSA. JA83; *see* JA173-175.

PDVSA now operates respondents' former business, using all of respondents' confiscated real and personal property—including the specialized drilling rigs and equipment, vehicles, office space, and maintenance forms—and employing H&P-V's rig managers, rig

workers, and other professionals to perform the functions the business had performed when run by respondents. JA76-78. Respondents no longer maintain any significant tangible property or commercial operations in Venezuela. Stripped of all its productive assets, H&P-V ceased to operate and no longer exists as a going concern. JA77-78.

In the ensuing six years, respondents have received no compensation. PDVSA initiated eminent-domain proceedings in Venezuela in July 2010, JA75-76, and respondents have participated as required under Venezuelan procedural rules. But those proceedings remain stalled indefinitely.

Nor can any compensation be expected. JA98-102. Private parties rarely prevail against the government in Venezuela's politically controlled courts. Out of 325 suits against the government surveyed by the U.S. State Department in 2009, the court ruled in the government's favor 324 times; the sole exception was later annulled. JA100-101. According to a 2010 report of the Inter-American Commission on Human Rights, Venezuelan judges handing down decisions negatively affecting government interests have been removed from the bench or even prosecuted and held under inhumane conditions. JA101. And as the U.S. Trade Representative reported in 2011, out of 76 companies nationalized under one 2009 law, none received compensation. JA80.

C. Proceedings Below

In September 2011, respondents sued petitioners for a taking in violation of international law, asserting jurisdiction under the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"). JA103-104, 131. That provision abrogates sovereign

immunity and authorizes U.S. courts to decide claims against a foreign state or its agencies and instrumentalities in any case where there is a commercial-activity nexus to the United States and where "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3); *see id.* § 1330(a).[2]

Nearly a year after the complaint was filed, petitioners moved to dismiss. Proceeding under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6), petitioners challenged the expropriation claims for lack of subject-matter jurisdiction, lack of standing, and lack of personal jurisdiction, as well as under the act-of-state doctrine and *forum non conveniens*. JA118. Apart from their act-of-state argument, petitioners did not move, and have never moved, to dismiss for failure to state a claim. *Id.*

Because some of petitioners' arguments raised factual challenges to jurisdiction, respondents served requests for jurisdictional discovery, as permitted by circuit precedent holding that when a motion to dismiss challenges the factual basis of FSIA jurisdiction, the court "must go beyond the pleadings" to resolve the factual dispute after allowing an appropriately tailored opportunity for jurisdictional discovery. *Phoenix Consulting, Inc.* v. *Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); *see* U.S. Br. 14 n.2. Petitioners refused to respond, so respondents moved to compel. JA3, 118.

---

[2] H&P-V also alleged breach-of-contract claims against PDVSA, asserting jurisdiction under the FSIA's commercial-activity exception, 28 U.S.C. § 1605(a)(2). Those claims are pending in a separate petition for certiorari. *Helmerich & Payne Int'l Drilling Co.* v. *Bolivarian Republic of Venezuela*, No. 15-698 (Nov. 25, 2015).

The parties resolved the dispute by agreeing in a joint stipulation to litigate four legal questions based on the allegations in the complaint—before any jurisdictional discovery—and to defer petitioners' other defenses for later adjudication after jurisdictional discovery. JA117-123. Among the four initial issues were two of petitioners' legal challenges to subject-matter jurisdiction under § 1605(a)(3). First, petitioners contended that their taking of property owned by H&P-V could not violate international law because H&P-V is incorporated in Venezuela. Second, petitioners contended that H&P-IDC's own "rights in property" were not taken in violation of international law because H&P-V held legal title to the seized assets. JA119-120, 134-142, 160-168, 177-178.

The district court rejected petitioners' latter argument and denied the motion to dismiss H&P-IDC's claim. JA160-169. The court granted the motion to dismiss H&P-V's claim. JA134-142, 168-169.

The U.S. Court of Appeals for the D.C. Circuit affirmed in part and reversed in part. In an opinion by Judge Tatel, joined by Chief Judge Garland, the court began by underscoring "the distinction between jurisdiction—a court's constitutional or statutory power to decide a case—and ultimate success on the merits." JA178. Citing *Bell* v. *Hood*, 327 U.S. 678 (1946), the court observed that "'[j]urisdiction ... is not defeated ... by the possibility that the averments [in a complaint] might fail to state a cause of action on which [the plaintiffs] could actually recover.'" JA178. The court therefore followed circuit precedent holding, consistent with *Bell*, that a motion to dismiss a FSIA claim on the ground that the plaintiff has not pleaded a taking of rights in property in violation of international law should be granted only if the claim is "'wholly insub-

stantial or frivolous.'" *Id.* (citing *Agudas Chasidei Chabad* v. *Russian Fed'n*, 528 F.3d 934, 943 (D.C. Cir. 2008)). Under that standard, the court held that respondents' expropriation claims could proceed.

As to H&P-V, the court acknowledged that a state's expropriation of its own national's property "generally" does not violate international law, JA179, but held that this "domestic takings rule" did not resolve the case in light of the complaint's allegations that petitioners "unreasonably discriminated against [H&P-V] on the basis of its sole shareholder's nationality," JA180. Those allegations "implicat[ed] an exception to the domestic takings rule" for discriminatory takings in which a state targets a domestically incorporated but foreign-owned corporation for expropriation based on the nationality of its owners. *Id.* The court found "'persuasive'" the Second Circuit's reasoning in *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *see* JA181, which considered the Castro regime's similar expropriation of U.S.-owned businesses incorporated in Cuba. *Sabbatino* held that "'[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for [the court] in passing on the validity of that treatment to look only to the 'nationality' of the corporate fiction.'" JA180 (quoting *Sabbatino*, 307 F.2d at 861); *see also Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 185 (2d Cir. 1967) (reaffirming *Sabbatino* "with emphasis"). The D.C. Circuit found that holding consistent with the *Restatement (Third) of Foreign Relations Law*, which "recognizes discriminatory takings as a violation of international law," and "cite[s] *Sabbatino* as an example" of an unlawful "discriminatory taking." JA180-181 (discussing *Restatement (Third) of Foreign Relations Law* § 712 cmt. f & reporter's note 5

(1987) ("*Restatement (Third)*")). The court emphasized that respondents' allegations "could be viewed as demonstrating 'unreasonable distinction' based on nationality" and were therefore "sufficient to plead a 'non-frivolous' discriminatory takings claim," JA182-183—particularly in light of petitioners' failure to cite any authority foreclosing H&P-V's claim, JA182.[3]

As to H&P-IDC, the court held that even though H&P-IDC did not own legal title to the expropriated assets, it had "sufficient rights in [the expropriated] property to support its expropriation claim." JA171. The court rejected petitioners' arguments, based on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), that "rights in property" under the expropriation exception "must mean corporate ownership." JA184. The court explained that *Dole Food* considered a separate provision of the FSIA that—unlike the expropriation exception—"expressly 'speaks of ownership'" of shares. *Id.* (discussing 28 U.S.C. § 1605(b)(2)). Because the expropriation exception "speaks only of 'rights in property'

---

[3] Petitioners relied below, as they do here (at 44-45), on *Barcelona Traction, Light & Power Co. (Belgium* v. *Spain)*, 1970 I.C.J. 3 (Feb. 5). The court of appeals did not find that decision to bar H&P-V's claim, *see* JA179-182—likely because the International Court of Justice there did not consider the question in *Sabbatino* and this case, but instead examined the very different question of countries' respective rights to assert "diplomatic protection" of a corporation. It held only that, as among sovereigns competing to espouse a private claim against another sovereign, the state of incorporation has a right superior to the shareholder's state to assert the corporation's interests against a third state. Even in that context, the ICJ stressed that when the state of incorporation is itself responsible for the injury, "considerations of equity might call for ... protection of the shareholders ... by their own national State." 1970 I.C.J. at 48 ¶¶ 92-93; *see Restatement (Third)* § 213 reporters' note 3 (1987).

generally, not ownership in shares," the court of appeals here followed the analysis in *Permanent Mission of India* v. *City of New York*, 551 U.S. 193, 197 (2007), which held that the phrase "rights in immovable property" in § 1605(a)(4) is not limited to "ownership or possession," but "'focuses more broadly on "rights in" property.'" JA185. And the court looked to circuit precedent holding that "corporate ownership of land and property ... does not deprive the sole beneficial owners—United States citizens—of a property interest" of their own. JA186 (quotation marks omitted). The court found that precedent "especially persuasive" because H&P-IDC "has suffered a total loss of control over its subsidiary, which has ceased operating as an ongoing enterprise because *all* of its assets were taken." JA187.

Judge Sentelle dissented as to the expropriation issues. JA194-199.

The court of appeals denied rehearing, JA44-45, and denied petitioners' motion to stay the mandate, JA46. The Chief Justice denied petitioners' application to this Court for a stay of the mandate. No. 15A258 (Sept. 1, 2015).

The case returned to the district court, where petitioners' other jurisdictional defenses remained pending. Among those defenses, petitioners contended that respondents' claims did not satisfy the expropriation exception's nexus requirement that, as relevant here, the expropriated property or its proceeds be "owned or operated by an agency or instrumentality of the foreign state ... that ... is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Because petitioners denied that those conditions were met, respondents sought jurisdictional discovery—consistent

with D.C. Circuit precedent, *supra* p. 8, and with the parties' agreement in the joint stipulation, JA120-121—tailored to determine the ownership or operation of the expropriated assets. *See* JA17-20. Despite the court's order setting deadlines for that limited jurisdictional discovery as contemplated by the joint stipulation, petitioners resisted discovery, and the court ultimately ordered them to respond to some requests. JA18-35.

Meanwhile, petitioners sought review of the court of appeals' decision in this Court, presenting two international-law issues and a third question concerning the application of *Bell* v. *Hood*. The Court granted the petition, limited to the *Bell* v. *Hood* question, and did not grant review of the international-law issues. The district court stayed further proceedings. JA35.

SUMMARY OF ARGUMENT

This Court has consistently held that "[j]urisdiction ... is not defeated ... by the possibility that the averments [in a complaint] might fail to state a cause of action on which [the plaintiff] could actually recover." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Contrary to petitioners' assertion (at 16), that rule was not specially "created" in *Bell* for use only in § 1331 cases. Long before *Bell* and since, the Court has followed that rule in evaluating jurisdiction under a wide range of statutes, regardless of variations in their text or policies. That ordinary practice reflects the nature of the jurisdictional inquiry and obviates a host of practical difficulties that would arise if a claim's merit were a jurisdictional requirement.

That rule dictates the outcome here. Under the expropriation exception, a foreign state "shall not be immune" from suit in the United States "in any case" in

which (1) the requisite commercial-activity nexus exists, and (2) "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). The latter prong requires that the plaintiff put "in issue" a claim that rights in property have been taken in violation of international law—the very type of inquiry that *Bell* routinely governs. That interpretation is compelled by the Act's use of the phrase "in issue," which simply asks what assertions are "in dispute" or "under discussion." It is compelled by the Act's history, which confirms that Congress enacted the expropriation exception to provide a U.S. forum to decide on the merits claims seeking a remedy for the unlawful taking of property by a foreign state. And it is compelled by the Act's structure, which imposes "substantive provisions requiring some form of substantial contact with the United States" and delineates "the types of actions for which foreign sovereigns may be held liable." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490, 496-497 (1983). When a complaint asserts "the type[] of action[]" authorized by the FSIA, *id.* at 496, and bears the prescribed contacts with the United States, the FSIA's "detailed federal law standards" are met, *id.* at 494, immunity from suit is abrogated, and the court has jurisdiction over the subject matter. Nothing in the FSIA displaces the longstanding, widespread practice that the possibility a claim might fail on its merits does not defeat the court's jurisdiction to decide the merits, at least where the claim is not "clearly ... immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous." *Bell*, 327 U.S. at 682-683.

Petitioners would surely prefer to resolve the merits question whether the complaint states a violation of international law for which respondents are entitled to

relief before litigating jurisdiction. Article III dictates otherwise. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998). Petitioners therefore seek an end-run around *Steel Co.* by conflating the merits question with the standard defining the court's jurisdiction to decide. But the purpose of the FSIA's jurisdictional grant is to abrogate the foreign sovereign's immunity from suit in order to allow the court to decide whether a violation has occurred for which plaintiffs are entitled to relief. It makes no sense to require courts to decide that merits question in order to determine their authority to decide it. And imposing that requirement would significantly complicate the litigation of FSIA claims by expanding the jurisdictional determination to include the full range of disputes that might arise on the merits, both legal and factual—with the added complexity that unless the rigorous standard of implied waiver of immunity is met, those merits disputes could not be waived, must be considered by courts *sua sponte*, and would presumably be the subject of repeated interlocutory appeals. Abandoning *Bell* would thus do nothing to promote comity or shield foreign sovereigns from the burdens of litigation. It would do the opposite. Absent any indication that Congress intended that result, the Court should adhere to its longstanding and well-settled jurisdictional practice.

ARGUMENT

I. JURISDICTION IS NOT DEFEATED BY THE POSSIBILITY A COMPLAINT MIGHT FAIL TO STATE A CLAIM

A. Subject-Matter Jurisdiction Does Not Turn On The Merits

It is "firmly established in [this Court's] cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction,

i.e., the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). "Whether the complaint states a cause of action on which relief could be granted ... must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); *see also Shapiro* v. *McManus*, 136 S. Ct. 450, 455 (2015) ("[w]e have long distinguished between failing to raise a substantial federal question for jurisdictional purposes ... and failing to state a claim for relief on the merits").

Petitioners portray that rule as an outlier, cabined to issues of federal-question jurisdiction under 28 U.S.C. § 1331. Their contention disregards nearly two centuries of precedent. This Court has long adhered to the foundational principle that where a provision confers jurisdiction over a particular type of claim, jurisdiction is established if the plaintiff asserts a claim within the defined class that is not wholly insubstantial or frivolous. The possibility that the claim might fail does not oust the court of jurisdiction to decide it.

This proposition is commonly attributed to *Bell*, but its roots run much deeper. In *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824), Chief Justice Marshall explained that a court's subject-matter jurisdiction "depend[s] on the character of the cause," not its merit. It therefore suffices to establish jurisdiction under Article III's "arising under" clause where:

> the title or right set up by the party, may be defeated by one construction of the constitution or laws of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out.

Id. As Justice Holmes later put it, "if [a] bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." *Hart* v. *B.F. Keith Vaudeville Exch.*, 262 U.S. 271, 273 (1923); *see also, e.g.*, *Huntington* v. *Laidley*, 176 U.S. 668, 679 (1900); *Swafford* v. *Templeton*, 185 U.S. 487, 493 (1902). By the time the Court decided *Bell*, it was "well settled" that so long as a claim is not "wholly insubstantial and frivolous," "[j]urisdiction ... is not defeated ... by the possibility that the averments [in a complaint] might fail to state a cause of action on which [the plaintiff] could actually recover." 327 U.S. at 682-683.

Although the Court first articulated this rule in defining courts' jurisdiction to consider cases "arising under" the Constitution and laws of the United States, the rule's development—contrary to petitioners' thesis—"[wa]s not grounded in [the 'arising under'] provision's particular phrasing." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1570 (2016). Rather, the rule derives from the very "nature of the jurisdictional inquiry," *Sisson* v. *Ruby*, 497 U.S. 358, 365 (1990), and the limits of courts' authority to act without jurisdiction.

Jurisdiction, this Court has frequently explained, is simply a court's "power to consider and decide one way or the other, as the law may require." *Geneva Furniture Mfg. Co.* v. *S. Karpen & Bros.*, 238 U.S. 254, 259 (1915); *see also, e.g.*, *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 577 (1999) ("authority over the category of claim in suit"); *Hagans* v. *Lavine*, 415 U.S. 528, 538 (1974) ("authority conferred by Congress to decide a given type of case one way or the other"); *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("authority to decide the case either way"). Because juris-

diction "refers to a tribunal's power to hear a case," it "presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (quotation marks omitted). The jurisdictional question is "legally and analytically antecedent" to the merits, *Sisson*, 497 U.S. at 365, and is "not to be declined merely because it is not foreseen with certainty that the outcome will help the plaintiff," *Geneva Furniture*, 238 U.S. at 259. Rather, as petitioners emphasize (at 21), a court must determine its jurisdiction at the outset; until it has done so, pronouncing upon the merits would "carr[y] the court[] beyond the bounds of authorized judicial action and thus offend[] fundamental principles of separation of powers." *Steel Co.*, 523 U.S. at 94; *see Ruhrgas*, 526 U.S. at 583.

The Court's long adherence to the *Bell* rule also reflects concern for what it has recognized are "drastic" consequences that would flow from treating a claim's merit as a threshold jurisdictional requirement. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011); *see Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513-516 (2006). Because subject-matter jurisdiction "'involves a court's power to hear a case,'" it can "'never be forfeited or waived'" unless the stringent test for waivers of immunity is met, and "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514; *see also, e.g.*, *Henderson*, 562 U.S. at 434-435 ("Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system."). For example, statutory arguments concerning the scope of jurisdiction "would have to be considered by this Court even though not raised

earlier in the litigation—indeed, this Court would have to raise them *sua sponte*," *Steel Co.*, 523 U.S. at 93, resulting in potential "waste of judicial resources" and "unfair[] prejudice [to] litigants," *Henderson*, 562 U.S. at 434; *see also Arbaugh*, 546 U.S. at 514. The Court has thus consistently rejected attempts to "forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits." *Illinois Cent. R.R. Co.* v. *Adams*, 180 U.S. 28, 40 (1901).

B. The *Bell* Rule Applies In A Wide Range Of Contexts

Given that it derives from practical considerations and "the nature of the jurisdictional inquiry," *Sisson*, 497 U.S. at 365, rather than the "particular phrasing" of any single provision, *Manning*, 136 S. Ct. at 1570, the Court has never limited the *Bell* rule to determinations of federal-question jurisdiction under § 1331. Contrary to petitioners' contentions, *Bell* constitutes the Court's "[n]ormal practice" across a wide range of jurisdictional determinations. *Jerome B. Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537 (1995). Some of those contexts involve provisions that, like § 1331, employ the "arising under" phrasing, such as where jurisdiction arises under the patent laws, *see, e.g.*, *The Fair*, 228 U.S. at 25; *Geneva Furniture*, 238 U.S. at 258-259; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U.S. 282, 285-286 (1902), or under laws regulating commerce, *see Louisville & Nashville R.R. Co.* v. *Rice*, 247 U.S. 201, 203 (1918). But the Court has also applied the *Bell* principle under statutes that use entirely different language to define the claims they authorize courts to decide.

1. Sherman Act

The Sherman Anti-Trust Act gave courts "jurisdiction to prevent and restrain violations of th[at] act." Act of July 2, 1890, 26 Stat. 209, 209.[4] In *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291, 304-305 (1923), the defendants argued that the plaintiffs "failed to state facts sufficient to constitute a cause of action" showing a violation of the Act, and the lower courts treated that failure as a jurisdictional defect. This Court reversed. Although the Sherman Act spoke of "violations" instead of claims "arising under" the statute, *cf.* Pet. Br. 32—or of "alleged" or "asserted" violations, *cf.* U.S. Br. 29—the Court explained that because jurisdiction is simply "the power to decide a justiciable controversy," it cannot turn upon the merits:

> A complaint, setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court, and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it.

263 U.S. at 305-306.

---

[4] Before 1980, federal jurisdiction over cases "arising under" the Constitution and laws of the United States was limited by a statutory amount-in-controversy requirement. *See Arbaugh*, 546 U.S. at 505-506. Individual statutes' jurisdictional grants therefore determined courts' authority to adjudicate claims under those statutes. *Id.*

2. Bankruptcy

Under the Bankruptcy Act of 1903, trustees were authorized to set aside certain preferences and fraudulent transfers and to recover the transferred property into the estate; the district courts had jurisdiction "[f]or the purpose of such recovery." *Stellwagen* v. *Clum*, 245 U.S. 605, 614 (1918) (quotation marks omitted); *see Flanders* v. *Coleman*, 250 U.S. 223, 227 (1919). In *Flanders*, the district court dismissed a suit for lack of jurisdiction after concluding that no preference or fraudulent transfer had been shown. 250 U.S. at 228. Although the statute did not use "arising under" language, this Court reversed, holding that consideration of the merits was not a proper basis for declining jurisdiction where "there was enough alleged to properly invoke jurisdiction":

> As this court has not infrequently said, jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which federal jurisdiction is invoked.

Id. at 228-229; *see also First Nat'l Bank of Denver* v. *Klug*, 186 U.S. 202, 204 (1902).

3. Criminal law

The Judicial Code of March 3, 1911, gave the district courts jurisdiction "[o]f all crimes and offenses cognizable under the authority of the United States." Pub. L. No. 61-475, § 24, 36 Stat. 1087, 1091 (1911). In *Lamar* v. *United States*, 240 U.S. 60 (1916), the defendant challenged the district court's jurisdiction on the ground that the indictment did not charge a crime against the United States. Writing for the Court, Justice Holmes rejected that argument:

> [N]othing can be clearer than that the district court, which has jurisdiction of all crimes cognizable under the authority of the United States, acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

Id. at 64 (citation omitted); *see also Louie* v. *United States*, 254 U.S. 548, 550-551 (1921) (defendant's argument that "an essential element of the crime against the United States was lacking" "did not raise a question properly of the jurisdiction of the court, but went to the merits").

The Court continued to follow that rule under the modern statutory grant of criminal jurisdiction. Under 18 U.S.C. § 3231, district courts have original and exclusive jurisdiction "of all offenses against the laws of the United States." In *United States* v. *Williams*, 341 U.S. 58 (1951), a perjury case, the lower courts held that the court in which the alleged perjury occurred had acted without jurisdiction—and that the defendant's conduct therefore did not constitute perjury—because the indictment in that proceeding had not stated a cognizable offense within the court's jurisdiction under § 3231. Citing *Bell*, this Court rejected that conclusion:

> The District Court had jurisdiction of offenses against the laws of the United States. Hence, it had jurisdiction of the subject matter, to wit, an alleged violation of the federal conspiracy statute, and, of course, of the persons charged.

> ... The circumstance that ultimately it is determined on appeal that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment.

Id. at 66.

4. Admiralty

The *Bell* rule constitutes the "[n]ormal practice" in admiralty jurisdiction, *Jerome B. Grubart*, 513 U.S. at 537, where the jurisdictional statute "giv[es] federal district courts 'original jurisdiction ... of ... [a]ny civil case of admiralty or maritime jurisdiction,'" *id.* at 531 (quoting 28 U.S.C. § 1333(1)). The Court has held, for example, that jurisdiction over maritime torts should not turn on a close examination of the particular causes of the alleged harm, because in making that inquiry a court "would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." *Sisson*, 497 U.S. at 365; *see also Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359 (1959) (regardless whether Jones Act provided a right of action for an alien seaman against a foreign shipowner, plaintiff asserted a "substantial claim" that was "sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights").

5. Section 1343(3)

The same approach governs 28 U.S.C. § 1343(3), which grants district courts "'jurisdiction of any civil action ... [t]o redress the deprivation, under color of any State law, ... of any right, privilege or immunity secured by the Constitution of the United States or by

any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.'" *Hagans*, 415 U.S. at 553. In *Hagans*, the court of appeals held that the plaintiff's equal protection claim failed rational-basis review and that the district court therefore lacked jurisdiction. *Id.* at 541-542. This Court reversed. Although the lower court's analysis of the equal protection claim might have "prove[d] correct," *id.* at 542, the claim was not so frivolous or insubstantial as to be outside the court's jurisdiction, *id.* at 539-540. The Court held that "the admonition of *Bell* v. *Hood* ... should be followed here"—namely, that "'[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.'" *Id.* at 542; *see also Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) (although plaintiff's claims under § 1985 failed, they were not "'wholly insubstantial and frivolous,' ... so as to deprive the District Court of jurisdiction" under § 1343(3)); *Baker* v. *Carr*, 369 U.S. 186, 199-201 (1962) (subject-matter jurisdiction lay under § 1343(3) where claim was not frivolous).[5]

---

[5] As its sole example of an alleged exception to the *Bell* rule, the United States cites (at 18 n.3) *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which involved a § 1983 suit against a municipal corporation. Citing later-rejected precedent that municipal corporations were not subject to suit under § 1983, the Court stated in dicta that if jurisdiction had been asserted under § 1343, "it would [have been] appropriate for this Court to inquire, for jurisdictional purposes, whether a statutory action had in fact been alleged." *Id.* at 278-279. But making a threshold determination that the named defendant is a proper defendant does not contravene *Bell*, any more than it would to determine at the threshold of a FSIA case whether a defendant is an "agency or instrumentality of a foreign state," *see* 28 U.S.C.

6. Securities Exchange Act

Section 78aa of Title 15 gives district courts "'exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder.'" *Morrison*, 561 U.S. at 254 n.3. In *Morrison*, the court of appeals affirmed a Rule 12(b)(1) dismissal of a securities class action for lack of subject-matter jurisdiction on the ground that § 10(b) of the Exchange Act did not apply extraterritorially. *Id.* at 253. This Court agreed that the plaintiffs failed to state a claim on which relief could be granted, *id.* at 273, but corrected the court of appeals' "threshold error" in finding a lack of jurisdiction, *id.* at 253. Citing *Bell*, the Court contrasted the "merits question" of "what conduct § 10(b) reaches"—which would determine whether a plaintiff's "allegations ... entitle him to relief"—from the "quite separate" issue of subject-matter jurisdiction, which "refers to a tribunal's power to hear a case." *Id.* at 254 (quotation marks omitted). The Court underscored that although the plaintiffs' allegations did not entitle them to relief under § 10(b), the district court had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question. *Id.*

7. Tucker Act

Although this Court has not squarely addressed the issue, the lower federal courts have consistently followed *Bell* in evaluating their exclusive jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), which waives the United States' sovereign immunity for specified types of claims, *see United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *Eastern Enters.* v. *Apfel*, 524 U.S.

---

§ 1603(b). Moreover, the Court in *Mt. Healthy* did not say what standard would apply in conducting that inquiry and did not purport to overrule *Hagans*.

498, 520 (1998). Citing *Bell*, the Court of Claims has held that where a plaintiff claims entitlement to a money award from the United States, the plaintiff "can properly come to the Court of Claims, at least if his claim is not frivolous but arguable." *Ralston Steel Corp.* v. *United States*, 340 F.2d 663, 667 (Ct. Cl. 1965), *cited with approval in Mitchell*, 463 U.S. at 217 n.16. Any argument that the plaintiff is not entitled to relief "wrongly equates the issue of jurisdiction with the merits." *Id.*; *see also Engage Learning, Inc.* v. *Salazar*, 660 F.3d 1346, 1353-1354 (Fed. Cir. 2011); *Aerolineas Argentinas* v. *United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996). That approach governs claims seeking compensation for a taking, as to which jurisdiction "is proper" when plaintiff asserts "a nonfrivolous takings claim founded upon the Fifth Amendment." *Moden* v. *United States*, 404 F.3d 1335, 1341 (Fed. Cir. 2005). The Court of Federal Claims thus routinely exercises jurisdiction over nonfrivolous takings claims against the United States even where the plaintiff ultimately fails to establish a compensable taking of cognizable property interests. *E.g.*, *Chittenden* v. *United States*, 126 Fed. Cl. 251, 259-266 (2016).

In each of these contexts, the statutory grants of jurisdiction used different language and reflected different policies. None said expressly that jurisdiction exists when rights are "'non-frivolously alleged to be' in issue," Pet. Br. 3, or where "specified rights are *colorably* in issue," Pet. Br. 29. Moreover, several of these contexts involved exclusive federal jurisdiction and had nothing to do with the allocation of jurisdiction between state and federal court. *See, e.g.*, *Morrison*, 561 U.S. at 254 n.3; *Eastern Enters.*, 524 U.S. at 520; *Williams*, 341 U.S. at 66; *cf.* Pet. Br. 4, 16, 35. But each statute authorized courts to decide a particular type of case. And

without regard to the statutes' particular text or policies, *cf.* U.S. Br. 26, the Court applied the settled rule that subject-matter jurisdiction—the courts' power to decide either way—is established when a plaintiff pleads a colorable claim within the defined category.

II. THE "NORMAL PRACTICE" APPLIES TO THE EXPROPRIATION EXCEPTION

Bell thus states a general rule that was "well settled" and widely applied long before Congress enacted the FSIA. *Bell*, 327 U.S. at 682. This Court "'presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents,'" *Clay* v. *United States*, 537 U.S. 522, 527 (2003); that presumption applies equally in interpreting jurisdictional provisions under the FSIA, *see Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 237 (2007); *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003) (construing FSIA "consistent with" longstanding jurisdictional principles). "Absent a clear statutory command to the contrary" in the FSIA, the Court should "assume that Congress is aware of the universality" of the jurisdictional practice under *Bell* and expected it to apply. *Powerex*, 551 U.S. at 237 (quotation marks omitted).

Nothing in the FSIA rebuts that presumption. It is true, as petitioners incant, that the FSIA contains "detailed federal law standards" that define the contours of immunity and "comprehensively regulat[e] the amenability of foreign nations to suit in the United States." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493-494 (1983). And of course courts must determine at the outset that the complaint "*actually* establishe[s]" the requirements of the relevant exception. Pet. Br. 22. But those propositions are not remotely inconsistent with applying *Bell*, because the relevant

requirement of the expropriation exception simply requires the assertion of a particular type of claim.

Section 1605(a)(3) contains two substantive requirements: (1) that a commercial-activity nexus to the United States exists—here, that the expropriated property or its proceeds are "owned or operated by an agency or instrumentality of the foreign state" that "is engaged in a commercial activity in the United States"—and (2) that "rights in property taken in violation of international law are in issue." Both of those requirements must "actually" be met. But the latter requirement is satisfied when the complaint actually places "in issue" a claim that rights in property have been taken in violation of international law. That is, it "requir[es] that [a] plaintiff assert a certain type of claim," *Agudas Chasidei Chabad* v. *Russian Fed'n*, 528 F.3d 934, 941 (D.C. Cir. 2008)—precisely the type of inquiry *Bell* governs. That reading is dictated by the FSIA's text, history and purpose, and structure.

A. The FSIA's Text Requires Plaintiffs To Place "In Issue" A Particular Type Of Claim

Section 1605(a)(3)'s condition that "rights in property taken in violation of international law are in issue" requires that the plaintiff put "in issue" a claim that its rights in property have been taken in violation of international law. Like many other jurisdictional grants, that condition confers authority "to decide a given type of case one way or the other." *Hagans*, 415 U.S. at 538. It does not require that the merit of the claim must already have been established.

As the United States recognizes, the phrase "in issue" typically means "under discussion" or "in dispute." U.S. Br. 15-16 (citing Garner, *A Dictionary of Modern*

Legal Usage 470 (2d ed. 1995)). The edition of Black's Law Dictionary in print when the FSIA was drafted reflects this understanding, indicating that a question raised by the pleadings is "at issue" if it is "affirmed on one side and denied on the other." *Black's Law Dictionary* 159 (4th ed. 1968). Rights in property taken in violation of international law are thus "in issue" if one side asserts a taking of rights in property in violation of international law and the other side denies it.

That interpretation of "in issue" accords with the phrase's natural meaning, as shown by its use in other contexts to refer to the subject of a dispute or argument presented for judicial resolution. The legal test for issue preclusion, for example, is often said to turn on whether a right or question was "in issue." *Aurora City* v. *West*, 74 U.S. (7 Wall.) 82, 98, 103 (1868); *see also, e.g.*, *Montana* v. *United States*, 440 U.S. 147, 153 (1979) (preclusion applies to "'right, question or fact distinctly put in issue and directly determined'"). These cases distinguish between the question "in issue" and the "determination of" that question. *Bates* v. *Bodie*, 245 U.S. 520, 526 (1918). The full faith and credit statute likewise ensures finality of matters "'properly put in issue and actually determined'" in prior proceedings. *San Remo Hotel, L.P.* v. *City & Cty. of San Francisco*, 545 U.S. 323, 337 (2005) (quoting *Southern Pac. R.R. Co.* v. *United States*, 168 U.S. 1, 49 (1897)). Similarly, a litigant is often said to open the door to argument or evidence on a particular subject by placing a contention "in issue" for resolution. *See, e.g.*, *Musacchio* v. *United States*, 136 S. Ct. 709, 718 (2016) ("statute-of-limitations defense becomes part of a case only if the defendant puts the defense in issue," triggering government's burden to establish compliance); *Simmons* v. *South Carolina*, 512 U.S. 154, 178 (1994)

(O'Connor, J., concurring in judgment) (where State "puts the defendant's future dangerousness in issue," due process entitles defendant to inform jury of parole ineligibility); *John Doe Co.* v. *United States*, 350 F.3d 299, 302 (2d Cir. 2003) (loss of attorney-client privilege resulting from assertion of factual claims is "described ... sometimes as *'at issue' waiver* because it results from the party having placed a contention at issue"). As in these contexts, Congress would naturally have understood and expected the phrase "in issue" to describe what the parties contested.

Comparison to § 1605(a)(4) reinforces this reading. Section 1605(a)(4) abrogates foreign sovereign immunity in "cases ... in which rights in property in the United States acquired by succession or gift ... are in issue." That exception permits litigation against foreign sovereigns concerning "disposition of the property of a deceased person." H.R. Rep. No. 94-1487, at 20 (1976); *see Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Gov't Relations of the H. Comm. on the Judiciary*, 93d Cong. 21 (1973) ("*1973 House Hearing*") (testimony of Hon. Charles N. Brower, Legal Adviser, Department of State) (§ 1605(a)(4) provided a "pretty clear exception for estate ... matters"). The purpose of the exception is to allow an orderly process for determining the rights of interested parties and disposing of property accordingly. It would make no sense to require the plaintiff first to establish those "rights in property" as a prerequisite to that orderly process. Rather, the exception turns on the type of claim at issue: whether "the sovereign's *claim* is as a successor to a private party." *In re Republic of Philippines*, 309 F.3d 1143, 1150 (9th Cir. 2002) (emphasis added); *see id.* at 1151 (no immunity where "foreign state *claims* the same right which is en-

joyed by private persons" (emphasis added; quotation marks omitted)). In such litigation, the validity of the sovereign's acquisition of rights in property is "in issue"—and therefore within the court's jurisdiction to determine—just as an expropriation claim puts "in issue" whether a sovereign took rights in property in violation of international law.

Petitioners rely heavily on *Permanent Mission of India* v. *City of New York*, 551 U.S. 193 (2007), which also considered § 1605(a)(4), but that decision supports the natural reading of "in issue." In *Permanent Mission*, the City of New York sued foreign governments "seeking declaratory judgments to establish the validity of [certain] tax liens" it held against the sovereigns' property. *Id.* at 196. The question was whether that action fell within the FSIA exception for "any case ... in which ... rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). The Court held that the City satisfied the exception by putting its alleged rights "in issue" without assessing whether the City would succeed in "establishing" the validity of the liens. 551 U.S. at 202 ("[A] suit *to establish* the validity of a tax lien places 'rights in immovable property ... in issue.'" (emphasis added)).

The Court took that approach even though the defendants claimed their property was "exempt from taxation pursuant to treaty." No. 06-134 U.S. Br. 4, 2007 WL 736599. If true, that would have meant that the City had no enforceable rights in property and that the defendants would have been entitled to dismissal for failure to state a claim. But the Court did not credit that argument, and it similarly refused to consider other arguments raised by the City that "ultimately [went] to the merits of the case." 551 U.S. at 201-202 & n.2. The Court explained: "Because the only question before

us is one of jurisdiction, and because the text and historical context of the FSIA demonstrate that petitioners are not immune from the City's suits, we leave these merits-related arguments to the lower courts." *Id.* at 202 n.2; *see infra* pp. 42-43.

In contrast to the use of "in issue" in these provisions, § 1610 allows attachment of a foreign sovereign's property where a judgment has already "establish[ed]" "rights in property which has been taken in violation of international law." 28 U.S.C. § 1610(a)(3). Congress could have used similar language in § 1605(a)(3) had it intended to limit the expropriation exception to cases in which an unlawful taking of rights in property had been "establish[ed]." It did not.

B. Congress Enacted The Expropriation Exception To Authorize U.S. Courts To Decide Whether Property Was Taken In Violation Of International Law

The history of the expropriation exception confirms that Congress intended it to authorize U.S. courts to decide certain claims: those asserting that property was taken in violation of international law.

Under the "absolute" theory of foreign sovereign immunity, foreign sovereigns could not be sued in U.S. courts without their consent, and courts generally deferred to the Executive Branch's "suggestions of immunity" in declining to exercise jurisdiction. *Verlinden*, 461 U.S. at 486-487. As foreign states increasingly engaged in commercial activity affecting U.S. interests, however, the State Department sought to "enable persons doing business with [foreign states] to have their rights determined in the courts." Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952), *reproduced in Alfred Dunhill of London,*

Inc. v. *Republic of Cuba*, 425 U.S. 682, 714 (1976) ("Tate Letter"). The State Department therefore abandoned the absolute theory in favor of the "restrictive" theory, which restricted foreign sovereign immunity to a state's "sovereign or public acts," while allowing claims to proceed "with respect to private acts." *Alfred Dunhill*, 425 U.S. at 711.

Even after the Tate Letter, however, "foreign nations often placed diplomatic pressure on the State Department," sometimes leading it to deviate from the restrictive theory. *Verlinden*, 461 U.S. at 487. As a result, "the governing standards were neither clear nor uniformly applied." *Id.* at 488. Congress responded by enacting the FSIA to depoliticize the immunity process and "'assur[e] litigants that ... decisions [would be] made on purely legal grounds and under procedures that insure due process.'" *Id.* (quoting H.R. Rep. No. 94-1487, at 7); *see Republic of Austria* v. *Altmann*, 541 U.S. 677, 689-691, 699 (2004). To that end, the FSIA shifted responsibility for deciding immunity questions from the Executive Branch to the courts, *Verlinden*, 461 U.S. at 487-488, and codified legal standards "provid[ing] when and how parties can maintain a lawsuit against a foreign state," H.R. Rep. No. 94-1487, at 6. Rather than reverting to a broader theory of immunity, those legal standards provided that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case" in which any of several exceptions is met. 28 U.S.C. § 1605(a).

The expropriation exception went further than the restrictive theory in limiting foreign sovereign immunity. Under the restrictive theory, sovereigns were immune from actions challenging "nationalization[s]" because they were "strictly political or public acts." *Vic-*

tory Transp. Inc. v. *Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964); *see* Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666, 1666 (1966). But years of mounting concern within the political branches at the threat to American interests posed by lawless foreign expropriations prompted the further restriction of sovereign immunity in expropriation cases.

As a 1963 report described, expropriation of American property abroad had increased substantially since 1945, *see* H. Comm. on Foreign Affairs, 88th Cong., *Report on Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century* (Comm. Print 1963), 2 I.L.M. 1066, 1081 (1963), prompting legislative measures aiming to provide redress for U.S. victims of expropriation. For example, in 1964, Congress addressed roadblocks created by the act-of-state doctrine with legislation to "establish the presumption that private litigants are entitled to have a cause decided in accordance with the legal principles normally applied by our courts in cases properly within their jurisdiction." 110 Cong. Rec. 19513, 19547 (1964). The legislation, codified at 22 U.S.C. § 2370(e)(2), "ma[de] clear that Federal and State courts are to be free in cases before them involving acts of foreign states to enforce principles of international law, including the requirement for prompt, adequate and effective compensation in cases of expropriation." 110 Cong. Rec. A5153, A5157 (1964).

But that legislation did not address sovereign immunity and thus did not assuage the political branches' concerns over the "rising trend" of takings of U.S.-owned property abroad. U.S. Department of State, Bureau of Intelligence and Research, *Nationalization, Expropriation, and Other Takings of United States*

and Certain Foreign Property since 1960, Research Study RECS-14 (Nov. 30, 1971), 11 I.L.M. 84, 84 (1972).[6] Lawless foreign expropriation of U.S.-owned property increasingly jeopardized the security of U.S. investments and property rights. *Id.* It also affected the U.S. government, which often provided guarantees against expropriation for U.S. investments in developing countries, amounting to several hundred million dollars in Latin America alone. *Id.* at 86-87. Congress expressed particular concern that "radical governments" were targeting U.S. companies "as a means of striking a blow at the United States Government." S. Rep. No. 93-676, at 263 (1974).

Throughout this period, the Executive Branch took the view that "under international law, the United States has a right to expect: [t]hat any taking of American private property will be nondiscriminatory; that it will be for a public purpose; and that its citizens will receive prompt, adequate, and effective compensation from the expropriating country." White House Press Release, *U.S. Statement on Economic Assistance and Investment in Developing Nations* (Jan. 19, 1972), 11 I.L.M. 239, 241 (1972). But as the trend of expropriations grew, compensation—if offered at all—generally remained inadequate. *Id.* at 240. And U.S. persons whose property was taken without compensation often

---

[6] *See also* U.S. Department of State, *Statement by the Department of State on Policy on "Hot" Libyan Oil*, 13 I.L.M. 767 (1974) (discussing 1973 nationalization of Libyan oil sector); S. Rep. No. 94-673, at 25 (1976) (discussing eight African expropriations in 1974); H.R. Rep. No. 94-541, at 31 (1975) (same); Comment, *American Oil Investors' Access to Domestic Courts in Foreign Nationalization Disputes*, 123 U. Pa. L. Rev. 610, 610 (1975) (by 1975, "threat of future nationalizations on a more extensive scale ha[d] become an imminent fear of the major oil investors").

lacked effective remedies. They could attempt to negotiate with the expropriating state, pursue remedies in the local courts of the expropriating state, or seek discretionary espousal of claims by the State Department, *see* Vandevelde, *Bilateral Investment Treaties* 23-26 (2010); in some cases, parties could pursue relief in arbitral tribunals or claims commissions established under international agreement, *id.* at 35-36, 283-284; Brownlie, *Principles of Public International Law* 522 (7th ed. 2008). These routes, however, rarely yielded adequate relief. *See Avoiding Expropriation Loss*, 79 Harv. L. Rev. at 1666-1667; Comment, *American Oil Investors' Access to Domestic Courts in Foreign Nationalization Disputes*, 123 U. Pa. L. Rev. 610, 612, 636-638 (1975). As the State Department acknowledged, the absence of a U.S. judicial forum often undermined the efficacy of these other options. U.S. Department of State, *Statement by the Department of State on Policy on "Hot" Libyan Oil*, 13 I.L.M. 767, 772 (1974). "[A]n important element of [any leverage] was legal action" in U.S. courts, *id.*, but at that time sovereign immunity blocked such suits, Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1618 (1962).

That was the backdrop when the Departments of State and Justice submitted draft legislation in 1973 that eventually became the FSIA and included a proposed exception for expropriation claims. *See 1973 House Hearing* 33-35 (letter from Attorney General Kleindeinst and Secretary of State Rogers (Jan. 16, 1973)). The expropriation exception reflects the political branches' decision, made after years of frustrated efforts to protect American investors through other means, to further restrict foreign sovereign immunity by authorizing courts to consider a particular type of

claim—namely, "expropriation claims" seeking redress for "nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law" and "takings which are arbitrary or discriminatory in nature." H.R. Rep. No. 94-1487, at 19-20. Congress also enacted measures to facilitate recovery of a remedy for plaintiffs that prevail in establishing a taking in violation of international law. *See* 28 U.S.C. § 1610(a)(3), (b)(2). Although some of those claims might fail, the point of the exception was to allow courts to decide them.

C. The FSIA's Structure Confirms That The Expropriation Exception Applies Where The Plaintiff Has Asserted A Colorable Expropriation Claim

Interpreting the expropriation exception to require plaintiffs to put a particular type of claim in issue aligns with the FSIA's other exceptions, which generally identify "types of actions for which foreign sovereigns may be held liable." *Verlinden*, 461 U.S. at 496-497.

Apart from the waiver exception, 28 U.S.C. § 1605(a)(1), each FSIA exception turns on certain characteristics of the claim. They generally require one or more of three types of conditions to be met: (1) that some nexus exists between the claim and the United States, (2) that some nexus exists between the claim and the sovereign's commercial activities, or (3) that the plaintiff asserts a particular type of claim. *See Verlinden*, 461 U.S. at 490, 496-497. The commercial-activity exception, for example, requires a nexus between the claim and the United States and between the claim and the sovereign's commercial activity, but does not require the plaintiff to assert any particular kind of claim. 28 U.S.C. § 1605(a)(2). The tort exception ap-

plies to a defined category of claims—those in which "money damages are sought" for torts meeting defined requirements—and requires a nexus between the claim and the United States, but does not require any tie to sovereign commercial activity. *See id.* § 1605(a)(5). The arbitration exception confers jurisdiction over certain types of claims—suits to enforce an arbitration agreement or confirm an arbitration award—where a nexus to the United States exists. *Id.* § 1605(a)(6). Section 1605(b) creates an exception to immunity for certain types of claims—suits in admiralty to enforce certain maritime liens—where there is a link to the sovereign's commercial activity. *Id.* § 1605(b); *see also id.* § 1605(d) (permitting actions to foreclose certain preferred mortgages); *id.* § 1605A (permitting actions "in which money damages are sought" for certain personal injuries); *id.* § 1607 (permitting certain categories of counterclaims).

Verlinden supports this understanding. That decision did not construe or apply any particular FSIA exception, but considered whether the jurisdiction the FSIA grants is within Article III's "arising under" clause. *See* 461 U.S. at 491-498.[7] The government emphasizes that in upholding the FSIA under Article III, the Court distinguished the FSIA's provisions "substantively regulating" foreign sovereign immunity from other jurisdictional grants that "'do nothing more than grant jurisdiction over a particular class of cases.'" U.S. Br. 13 (quoting *Verlinden*, 461 U.S. at 496). But *Verlinden* explained what "more" the FSIA entails, *id.*: Unlike other jurisdictional grants, the FSIA contains

---

[7] The case thus had nothing to do with importing the well-pleaded complaint rule or any other aspect of § 1331 into the FSIA. *Cf.* Pet. Br. 36.

"substantive provisions requiring some form of substantial contact with the United States," 461 U.S. at 490, *in addition to* provisions "govern[ing] the types of actions for which foreign sovereigns may be held liable," *id.* at 496-497. *Verlinden* did not hold or even hint that actions under the FSIA would have to be resolved on the merits at the outset. *See also Altmann*, 541 U.S. at 695 (FSIA "opens United States courts to plaintiffs with pre-existing claims against foreign states" without imposing standards of liability).

Congress thus designed the FSIA to authorize courts to adjudicate particular "types of actions" against foreign sovereigns—the very sort of jurisdictional inquiry *Bell* governs—where "some form of substantial contact with the United States" exists. *Verlinden*, 461 U.S. at 490, 496. The expropriation exception is no different. Petitioners therefore err in contending (at 27) that applying *Bell* results in a "different standard for the expropriation exception." Under each exception, the court must determine whether the complaint "*actually* establishe[s]" the required elements. Pet. Br. 22. Where jurisdiction is asserted under the waiver exception, the court must find an actual waiver. Where jurisdiction rests on a commercial-activity nexus to the United States, the court must determine that the nexus actually exists. And where jurisdiction depends on the plaintiff having asserted a particular "type[] of action[]," *Verlinden*, 461 U.S. at 496, the court must determine that the claim is actually of that "type[]." That analysis is what is required for a court to "satisfy itself that one of the [FSIA's] exceptions applies" by "apply[ing] the detailed federal law standards set forth in the [FSIA]." *Id.* at 493-494. Applying *Bell* to determine that a claim is of the authorized "type[]" simply adheres to the "[n]ormal practice" that applies

whenever jurisdiction depends on the plaintiff having asserted a particular type of claim, *Jerome B. Grubart*, 513 U.S. at 537, and avoids the problematic consequences of turning every merits argument into a jurisdictional question, *Steel Co.*, 523 U.S. at 93.

Petitioners' reliance (at 24-26) on cases addressing the commercial-activity exception is therefore misplaced. *See also* U.S. Br. 18 n.3. That exception does not require assertion of any particular kind of claim. It requires instead a nexus between sovereign commercial activity and the United States. Thus, in *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 395 (2015), and *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 351 (1993), the Court did not examine whether the actions fell within a defined class, let alone whether the claims had merit. Instead, the Court examined whether the claims—whatever their nature—were "based upon" conduct that actually satisfied the nexus requirements. *Sachs*, 136 S. Ct. at 395; *Nelson*, 507 U.S. at 351.[8]

Petitioners' reliance on *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), fails for similar reasons. That case examined whether the tort exception, 28 U.S.C. § 1605(a)(5), conferred jurisdiction over a claim for damage sustained to plaintiffs' ship during a military attack near Argentina. The Court held that the claim could not proceed because the tort exception covers only "those cases in which the

---

[8] Contrary to petitioners' assertion (at 26, 37), the Court did not "determine[] the viability" of the plaintiffs' claims in *Sachs* and *Nelson*, but merely identified the "allegedly" wrongful conduct to determine the gravamen of each suit according to the plaintiff's theory of the case. *Sachs*, 136 S. Ct. at 396; *see Nelson*, 507 U.S. at 358 (plaintiffs had not "alleged breach of contract," but "personal injuries caused by" intentional wrongs and failure to warn; "[t]hose torts ... form the basis for the ... suit").

damage to or loss of property occurs *in the United States*." 488 U.S. at 439-440. Like the nexus requirements of the expropriation exception or the commercial-activity exception, the requirement that an alleged tort "occur[] in the United States" is a nexus requirement that must actually be met for the claim to proceed, and the Court appropriately examined whether it was. *See id.* at 439-441. The Court did not consider whether the plaintiff asserted a tort within a defined class or evaluate the merit of that "alleged tort." *Id.*[9]

Petitioners' discussion of these cases completely misunderstands *Bell* and the significance of overlap between merits and jurisdiction. Petitioners appear to find these cases relevant because the jurisdictional analyses addressed points that pertained also to the merits; petitioners construe that "overlap" between jurisdiction and merits to mean the Court must have silently decided not to apply *Bell*. *See* Pet. Br. 22-26; *see also* U.S. Br. 29. But the controlling principle in *Bell* is that when a statute confers jurisdiction over a particular type of claim and the plaintiff asserts a substantial claim of that type, jurisdiction is not defeated by the possibility that the allegations might not entitle the

---

[9] Petitioners give (at 23) the most expansive possible reading to the Court's statement that "none of the enumerated exceptions" applied. *Amerada Hess*, 488 U.S. at 443. Because that passing statement gave no reasoning and did not reveal what issues the Court might have considered, it provides no support for petitioners' analysis. *Cf. Steel Co.*, 523 U.S. at 91. The Court's rejection of the plaintiffs' reliance on certain international agreements also lends no support. *Cf.* Pet. Br. 23-24. The Court did not interpret any particular exception in light of those agreements or hold that jurisdiction was defeated due to a lack of merit in the claim; it considered only whether those agreements should be interpreted to "create an exception" due to a conflict with the FSIA. *Amerada Hess*, 488 U.S. at 441-442.

plaintiff to relief on the merits. *See Morrison*, 561 U.S. at 254; *Bell*, 327 U.S. at 682-683. That does not mean that the jurisdictional inquiry can never touch on issues that relate also to the merits—for example, by requiring a court to consider what elements a claim is "based upon" to determine whether the commercial-activity nexus exists. *See Sachs*, 136 S. Ct. at 395. It simply means that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co.*, 523 U.S. at 89. Petitioners and the government do not cite a single FSIA case in which this Court found jurisdiction lacking because the complaint failed to state a valid claim entitling the plaintiff to relief.

In *Permanent Mission*, for example, the City's claim satisfied § 1605(a)(4) by putting the City's rights "in issue," without regard to whether the City would succeed in establishing the validity of those rights. *See* 551 U.S. at 200 (action "*seeking the declaration of the validity* of a tax lien on property is a suit to establish an interest in such property" (emphasis added)); *id.* at 202 (suit "*to establish the validity* of a tax lien places 'right in immovable property ... in issue'" (emphasis added)).

Petitioners emphasize (at 26-27) *Permanent Mission*'s discussion of New York property law granting lienholders a nonpossessory interest in property. *See* 551 U.S. at 198. But the Court did not specify the standard it applied in considering the nature of the City's asserted rights. Neither the parties nor the government had addressed the relevant standard in their briefs, *see* No. 06-134 Pet. Br., 2007 WL 608160; No. 06-134 Resp. Br., 2007 WL 1033565; No. 06-134 U.S. Br., 2007 WL 736599, and the issue did not arise at oral argument, *see* No. 06-134 Oral Argument, 2007 WL 1198566 (Apr. 24, 2007). Petitioners infer that the

Court silently departed from *Bell* in conducting that inquiry; but that would have been a curious departure when, in the same opinion, the Court explicitly stressed the line between jurisdiction and the merits and explicitly held that the suit placed the City's lien rights "in issue" regardless of the validity of those rights or the defendants' obligation to pay. 551 U.S. at 200-202 & n.2. The better inference is that the Court simply did not consider or found it unnecessary to address *Bell*'s applicability.

In any event, such decisions that do not "'explicitly consider[]'" whether a defense goes to jurisdiction or the merits "should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit," *Arbaugh*, 546 U.S. at 511—particularly where, as in *Permanent Mission*, the "decision did not turn on that characterization, and the parties did not cross swords over it," *id.* at 512; *see also Steel Co.*, 523 U.S. at 91 ("fanciful to think [a prior decision] revised [the Court's] established jurisprudence" when the jurisdictional character of the issues decided "made no substantive difference, ... had been assumed by the parties, and was assumed without discussion by the Court"); *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (where the Court "at most assumed the applicability" of a particular standard, the Court is free to reevaluate whether that standard applies).

Finally, petitioners gain no support from the fact that foreign sovereigns are "ordinarily" and "normally" immune from suit under the FSIA. Pet. Br. 17, 21, 37-38. That is so only because claims falling outside the statutory exceptions cannot proceed—a restriction that bars a vast range of actions. But it is the "defendant['s] ... burden [to] prov[e] that the plaintiff's allegations do not bring its case within a statutory exception to im-

munity." *Phoenix Consulting, Inc.* v. *Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (quotation marks omitted); *see* H.R. Rep. No. 94-1487, at 17; 13A Fed. Proc. § 36:458 (Sept. 2016). And when a suit does implicate an exception, the statute does not suggest that jurisdiction should "ordinarily" fail or "place a heavy thumb on the immunity side of the scale." Pet. Br. 17, 37. It simply allows the suit to proceed, the point of which is to determine the sovereign's liability on the merits. *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009). Nothing in the FSIA suggests that the determination of liability should precede or replace the immunity decision. Doing so would disregard the text, structure, and purposes of the FSIA, as well as "firmly established" jurisdictional practice, *Steel Co.*, 523 U.S. at 89.

III. Abandoning *Bell* Would Complicate FSIA Litigation And Undermine FSIA Policies

The Court has adhered to *Bell* in many contexts in part to avoid the consequences that would follow from equating the questions of jurisdiction and merits. *Supra* pp. 18-27. Petitioners' proposed rule—requiring a threshold jurisdictional determination that "rights in property" were in fact "taken in violation of international law"—would generate precisely the problems *Bell* seeks to avoid, while in no way protecting sovereign interests.

A. Petitioners' Rule Would Frontload The Burdens Of Litigation Into The Threshold Phase

Under petitioners' rule, a plaintiff must show at the outset that the defendant "*actually* violate[d] customary international law." Pet. Br. 27; *see id.* at 28-29; U.S. Br. 17 (jurisdiction exists only where "'international

law' has been 'violat[ed]'"). The primary effect of that requirement would be to frontload the determination of the merits into the earliest phase of FSIA litigation. Doing so would subject the sovereign defendant to substantially more burdensome litigation at the jurisdictional stage than if *Bell* applies.

For example, in expropriation cases where some compensation has been paid but the plaintiff challenges it as inadequate, jurisdiction would turn on whether the compensation was "prompt, adequate, and effective," as required by international law. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 429 (1964). Making that determination would require the court to interpret and apply those legal requirements, and potentially to receive expert testimony and other evidence to determine the value of the expropriated property. Similarly, where a plaintiff contends that a taking was "discriminatory" or "not for a public purpose," *id.*, the court would have to interpret those legal standards; and to the extent the defendant challenged those allegations as a factual matter, discovery into the motivations behind the taking would be required at the very outset to determine whether the foreign sovereign acted in an unreasonably discriminatory manner. *See Phoenix Consulting*, 216 F.3d at 40.

Petitioners seek to obscure this consequence of their position by asserting (at 29-30) that under their view, at the pleading stage, the district court would take the plaintiff's factual allegations as true and decide only their legal sufficiency to state a claim for relief. But under petitioners' theory, the line cannot be drawn at legal sufficiency—a point the United States appears to acknowledge (at 14 & n.2). As a procedural matter, FSIA defendants are not constrained to "challenge[] only the legal sufficiency of the plaintiff's jurisdictional

allegations," but may also "dispute ... the factual basis of the court's subject matter jurisdiction." *Phoenix Consulting*, 216 F.3d at 40. In that event, "the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff," but "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Id.*; *see also* U.S. Br. 14 n.2 (citing authorities). Perhaps petitioners mean to suggest that a sovereign defendant should not be permitted to raise factual challenges in a motion to dismiss for lack of subject-matter jurisdiction; but petitioners themselves asserted such factual defenses here as to the expropriation exception's nexus requirements. *Supra* pp. 8, 12-13. They could as easily have chosen to contest whether the expropriation was in fact discriminatory. And if it is permissible for the defendant to challenge those allegations, it must be permissible for the plaintiff to obtain relevant discovery, and obligatory for the court to resolve the dispute. *Phoenix Consulting*, 216 F.3d at 40; U.S. Br. 14 n.2.

The logic of petitioners' theory also supports no distinction between legal and factual sufficiency. If, as petitioners' contend, jurisdiction under the expropriation exception required not just the assertion of a particular type of claim, but a definitive assessment that rights in property have been taken in violation of international law, *see* Pet. Br. 28-29, 33, then there would be no basis for allowing a claim to proceed if the defendant could show on the facts that no violation of international law had occurred. *See* U.S. Br. 8 (no jurisdiction where unlawful taking of rights in property "may have" occurred). Either the expropriation exception requires a threshold assessment of whether "'international law' has been 'violat[ed],'" U.S. Br. 17, or it does not. Peti-

tioners cite no principled reason why legal insufficiency on the merits should defeat jurisdiction but factual insufficiency should not.

Moreover, by turning those merits questions into jurisdictional ones, petitioners' approach would subject the merits determination to distinct rules concerning waiver and the courts' obligation to consider its jurisdiction *sua sponte*. *Steel Co.*, 523 U.S. at 92-93. Assuming a sovereign had not waived its immunity, "statutory arguments" as to whether a particular taking violated international law, "since they are 'jurisdictional,' would have to be considered by this Court even though not raised earlier in the litigation—indeed, this Court would have to raise them *sua sponte*." *Id.* at 93; *see also Arbaugh*, 546 U.S. at 514. If jurisdiction exists only in cases "in which 'international law' has been 'violat[ed],'" U.S. Br. 17, the court cannot bypass resolution of legal or factual disputes relevant to that question. *Steel Co.*, 523 U.S. at 93-101.

To make matters worse, courts generally permit immediate appeal of orders denying dismissal on sovereign immunity grounds under the collateral-order doctrine. *See Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C. Cir. 2004); U.S. Br. 20. Under petitioners' rule, defendants would presumably seek interlocutory appeals of the expanded set of merits determinations required to establish jurisdiction. *See* U.S. Br. 31.[10] But piecemeal litigation punc-

---

[10] Ordinarily, interlocutory appeals may proceed under the collateral-order doctrine because they are just that: collateral to and "completely separate from" the merits. *Kilburn*, 376 F.3d at 1126. Petitioners' conflation of the validity of the claim with the jurisdictional test under the expropriation exception is in substantial tension with that rule and raises the question whether inter-

tuated by interlocutory appeals is highly disfavored because it derails the orderly administration of justice and impairs finality. *E.g.*, *Johnson* v. *Jones*, 515 U.S. 304, 309-312 (1995). In FSIA litigation, the collateral-order doctrine already introduces extraordinary delays that undercut the access to U.S. courts that the FSIA was intended to ensure. Here, for example, five years have passed since the complaint was filed—six years since petitioners seized respondents' business—and respondents remain uncompensated while petitioners' jurisdictional challenges remain unresolved. *See also, e.g.*, *McKesson Corp.* v. *Islamic Republic of Iran*, 672 F.3d 1066, 1070 (D.C. Cir. 2012) ("after almost thirty years of effort," including five prior appeals, "this litigation has yet to definitively address ... whether this Court has jurisdiction over McKesson's claim"). Petitioners' rule would exponentially increase these burdens on courts and litigants.

By comparison, the litigation required to establish jurisdiction under the expropriation exception when *Bell* applies is far more efficient. To be sure, as petitioners note (at 42-43), jurisdictional discovery into factual issues concerning the nexus requirements may be necessary. Congress imposed strict factual nexus requirements that must be met before the case may proceed, and it contemplated that jurisdictional discovery would be appropriate. *See* H.R. Rep. No. 94-1487, at 17. Similar discovery is frequently necessary under other exceptions as well. *See, e.g.*, *Phoenix Consulting*, 216 F.3d at 41 (remanding for discovery as to whether contract waiving immunity was forged); *Intelsat Global Sales & Mktg., Ltd.* v. *Community of Yugoslav Posts*

---

locutory appeal should even be allowed—a result that certainly would not shield sovereigns from the burdens of litigation.

Telegraphs & Telephones, 534 F. Supp. 2d 32, 36 (D.D.C. 2008) (discovery warranted as to whether defendant was an "agency or instrumentality"); *Lee* v. *Taipei Econ. & Cultural Representative Office*, 716 F Supp. 2d 626, 632 (S.D. Tex. 2009) (ordering limited discovery to determine whether activities were "commercial" under commercial-activity exception).

Tailored jurisdictional discovery is consistent with the FSIA's presumption of immunity. The purpose of such discovery is to test the defendant's assertion of immunity. Fairness dictates that the defendant cannot assert immunity based on a factual argument and then preclude discovery into the basis of the assertion. FSIA jurisdictional discovery is also far narrower than the "full-blown discovery" petitioners fear (at 42). Rather than encompassing all "nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," Fed. R. Civ. P. 26(b), jurisdictional discovery must be "'carefully controlled and limited,'" and requires a nexus between each discovery request and the defendant's factual challenge to jurisdiction, as the district court required here. *See Helmerich & Payne Int'l Drilling Co.* v. *Bolivarian Republic of Venezuela*, 2016 WL 2771117, at *3 (D.D.C. May 13, 2016); *see also, e.g., id.* at *7-11 (scrutinizing predicate for respondents' discovery and conducting request-by-request, interrogatory-by-interrogatory review of permissible discovery); *In re Papandreou*, 139 F.3d 247, 252-254 (D.C. Cir. 1998) (issuing writ of mandamus to restrain unwarranted FSIA jurisdictional discovery). Once jurisdiction is established, the defendant can promptly move to dismiss for failure to state a claim. Only then, if the motion is denied, would merits discovery proceed.

Petitioners' objections to the alleged burdens of jurisdictional discovery make one thing clear: Their real complaint stems not so much from the lower courts' adherence to *Bell*, as from the courts' adherence to the holding of *Steel Co.* that a court cannot assume that jurisdiction exists and skip ahead to merits questions it views as more readily resolved, *see* 523 U.S. at 93-94. Like many litigants in many contexts, petitioners would prefer to litigate the Rule 12(b)(6) legal question—whether respondents have stated a violation of international law for which they are entitled to relief—without first litigating jurisdiction. *See* Pet. Br. 42-43. Petitioners took a similar tack in urging the lower courts to resolve their merits defense under the act-of-state doctrine before resolving subject-matter jurisdiction. JA142-146, 187-188; Pet. Br. 9 n.1. Here, petitioners seek to equate the legal sufficiency of the claim on its merits with the jurisdictional question, in defiance of *Bell*, to achieve an end-run around *Steel Co.* and allow determination of the 12(b)(6) question before litigating the jurisdictional nexus requirements. But this Court has explained why that approach is both impermissible as a separation-of-powers matter and seriously ill-advised as a practical matter. *See Steel Co.*, 523 U.S. at 92-102; *Ruhrgas*, 526 U.S. at 583.

On the other hand, adhering to ordinary practice under *Bell* and *Steel Co.* respects the limits of courts' authority to address merits issues before establishing jurisdiction, confines initial discovery to those fact-based jurisdictional challenges to the nexus requirement that the sovereign chooses to mount, and appropriately defers the burdens of litigating the plaintiff's entitlement to relief to the merits stage. Abandoning *Bell* frontloads those burdens into the jurisdictional

phase, at the expense of further delay and prejudice to both parties.

B. Abandoning *Bell* Would Serve No Other Policy

Petitioners warn (at 28, 41) that adhering to *Bell* will allow plaintiffs to escape rigorous jurisdictional scrutiny through "artful pleading." That criticism is directed primarily at the court of appeals' decision in *Simon* v. *Republic of Hungary*, 812 F.3d 127, 141 (D.C. Cir. 2016), which considered the standard a court should apply in evaluating its jurisdiction under the expropriation exception over "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution" when a violation of international law (there, genocide) had been shown. *See* U.S. Br. 28, 30. Whether *Simon* decided that question correctly is not presented; but even assuming it did, there are many reasons why the prospect of artful pleading is not a meaningful concern here.[11]

Bell contemplates dismissal of claims "made solely for the purpose of obtaining jurisdiction," 327 U.S. at 682, and courts regularly dismiss complaints that merely "recite" a claim simply "to avoid jurisdictional dismissal[]," Pet. Br. 41; *see Nelson*, 507 U.S. at 363; *Williams* v. *Aztar Ind. Gaming Corp.*, 351 F.3d 294, 299-300 (7th Cir. 2003) (RICO theory was "so transparent an attempt to move a state-law dispute to federal court" that court lacked federal-question jurisdiction); *Holloway* v. *Schweiker*, 724 F.2d 1102, 1105 (4th Cir. 1984) (affirming dismissal for lack of jurisdiction where

---

[11] Where a tort claim effectively contests whether rights in property were taken in violation of international law, and is not simply "incidental to" ownership of such property, *see Permanent Mission*, 551 U.S. at 200, *Bell* arguably *should* apply.

"pleading in constitutional terms appear[ed] to be designed solely for the purpose of obtaining jurisdiction"); *Local Div. 732, Amalgamated Transit Union* v. *Metropolitan Atlanta Rapid Transit Auth.*, 667 F.2d 1327, 1341-1342 (11th Cir. 1982) (where claim purported to enforce federal statute, but sought only common-law remedies, it was "abundantly clear" the claim was "made solely for the purpose of obtaining jurisdiction").

Petitioners' warnings also overlook the FSIA's nexus requirements, which must be satisfied at the threshold of every case. These requirements turn away suits that lack sufficient connection to the United States, as well as those lacking a connection to sovereign commercial activity. *See, e.g.*, *Ezeiruaku* v. *Bull*, 617 F. App'x 179, 182 (3d Cir. 2015) (per curiam) (plaintiff failed to allege that defendant engaged in commercial activity in the United States); *Best Med. Belgium, Inc.* v. *Kingdom of Belgium*, 913 F. Supp. 2d 230, 240-241 (E.D. Va. 2012) (plaintiff failed to satisfy either nexus requirement).

The government suggests (at 21) the additional concern that adhering to *Bell* could negatively affect the "'reciprocal self-interest'" of the United States by inviting foreign courts to apply a standard akin to *Bell* to determine the United States' immunity from suit—the same standard that governs the United States' immunity from suit in U.S. courts under the Tucker Act, *supra* p. 25-26. That supposed concern rests on the fallacy that applying *Bell* means forgoing a "full substantive determination of immunity." U.S. Br. 22. As discussed, determining that the nexus requirements are actually met and that the plaintiff has actually put in issue a substantial claim that rights in property were taken in violation of international law *is* the "full substantive determination" of immunity and subject-

matter jurisdiction that the FSIA requires. *Supra* pp. 27-44.

In any event, the government's tally (at 21) of cases in which the United States is a party is highly misleading. The cited statistics include suits against *and by* the government; and they include a wide variety of actions. *See* U.S. Dep't of Justice, *Office of Foreign Litigation*, https://www.justice.gov/civil/office-foreign-litigation (last updated Oct. 20, 2014). The government relies on these generic statistics for good reason: Neither petitioners nor the government have identified a single expropriation claim brought against the United States in a foreign court. *See also* U.S. Dep't of State, *Digest of United States Practice in International Law* (1989-2015 eds.) (citing no expropriation claims against the United States in foreign courts). That is not surprising, as the United States, unlike Venezuela, is not generally in the business of confiscating private property without paying for it or discriminating against property owners because of their nationality; and U.S. courts, unlike Venezuela's, routinely adjudicate takings claims fairly and impartially.

The government also posits (at 20) that abandoning *Bell* would better "preserve the dignity of foreign sovereigns" and "ensure comity between nations." The argument again assumes its conclusion: Adhering to *Bell* does not forgo the "substantive legal determination that the [expropriation] exception[] dictate[s]," U.S. Br. 20, because the exception does not require plaintiffs to prove their entitlement to relief to establish jurisdiction. If anything, it is petitioners' proposed rule that would provoke a far more significant affront to sovereign dignity and international comity. By frontloading the determination whether "'international law' has been 'violat[ed]'" into the jurisdictional phase, *id.* at 17,

petitioners' approach would encourage judicial pronouncements upon the unlawfulness of foreign sovereign conduct that in many cases could be avoided once jurisdiction has been established under *Bell* if, for example, the act-of-state doctrine or another defense applied. *See Altmann*, 541 U.S. at 700 ("Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits."). By adhering to *Bell*, in contrast, a court can dispose of a substantial but non-meritorious expropriation claim on such grounds without declaring that the sovereign violated international law.

Finally, the government's invocation of comity should be placed in proper context. As discussed, before the FSIA's passage, the restrictive theory did not accommodate any exception to immunity for expropriation claims. *Supra* pp. 33-34. After extended consideration, Congress and the Executive Branch created the expropriation exception to afford plaintiffs an opportunity to seek redress for unlawful takings, following decades in which many foreign sovereigns displayed an extraordinary lack of comity toward the United States by expropriating U.S.-owned interests without compensation—sometimes *because* they were American, as petitioners did here. *Supra* pp. 5-6, 33-37. The government's views on the interpretation of that exception "merit no special deference." *Altmann*, 541 U.S. at 701. If the government now believes (at 21) that displacing nearly two centuries of jurisdictional practice is necessary to prevent "perceived affronts" to the dignity of foreign sovereigns that lawlessly target U.S. property for expropriation, its recourse is to propose an amendment to the FSIA to effectuate that intent. *See Pow-erex*, 551 U.S. at 237-238. Absent anything to that ef-

fect in the statute as written, the Court should adhere to its long-standing practice, of which Congress was presumptively aware in enacting the FSIA, and to the textual requirement that jurisdiction turns on the nexus requirements and the type of dispute "in issue."[12]

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
BLAKE C. ROBERTS
MOLLY M. JENNINGS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

SEPTEMBER 2016

---

[12] Should the Court disagree with that view, the only outcome fairly within the scope of the question presented would be to remand for the court of appeals to consider petitioners' motion to dismiss under a different standard in the first instance. *See* U.S. Br. 34; *compare* Pet. Br. 48 (suggesting reversal), *with, e.g.*, Shapiro et al., *Supreme Court Practice* 340 (10th ed. 2013) ("An order limiting the grant of certiorari to certain questions is binding upon counsel, and argument ordinarily will not be heard on questions outside the scope of the order."); *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-254 & n.2 (1999) (per curiam).

Supreme Court, U.S.
FILED
OCT 21 2016
OFFICE OF THE CLERK

No. 15-423

IN THE
Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

JOSEPH D. PIZZURRO
ROBERT B. GARCÍA
KEVIN A. MEEHAN
CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178

BRUCE D. OAKLEY
Counsel of Record
HOGAN LOVELLS US LLP
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

WILLIAM L. MONTS, III
CATHERINE E. STETSON
MARY HELEN WIMBERLY
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 DISCLOSURE STATEMENT

The disclosure statement in the Brief for Petitioners remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

ARGUMENT 1

I. THE COURT SHOULD ADOPT THE PLEADING STANDARD ADVOCATED BY VENEZUELA AND THE UNITED STATES 2

II. *BELL* DOES NOT APPLY TO EXPROPRIATION-EXCEPTION PLEADINGS 5

A. Respondents' Text-Based Arguments Are Weak At Best And Contradictory At Worst 5

B. Respondents' Analogies To Other Statutes Are Misplaced 9

C. *Bell* Is Not A Universal Rule Of Jurisdictional Pleading 14

D. The FSIA's History And Purpose, As Well As Practical Considerations, Support The Conclusion That *Bell* Does Not Apply To The Expropriation Exception 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES:

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 15

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 9, 18, 19

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) 24

Bank Markazi v. *Peterson*, 136 S. Ct. 1310 (2016) 9-10, 12, 23

Bell v. *Hood*, 327 U.S. 678 (1946) ..... *passim*

Binderup v. *Pathe Exch., Inc.*, 263 U.S. 291 (1923) 13

City of Indianapolis v. *Chase Nat'l Bank of City of N.Y.*, 314 U.S. 63 (1941) 17

Doe v. *Drummond Co.*, 782 F.3d 576 (11th Cir. 2015) 12

Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 5

Everhart v. *Huntsville Female Coll.*, 120 U.S. 223 (1887) 17

Flanders v. *Coleman*, 250 U.S. 223 (1919) 13

Foremost-McKesson, Inc. v. *Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) 23

Hennessy v. *Richardson Drug Co.*, 189 U.S. 25 (1903) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Hertz Corp. v. *Friend*,
559 U.S. 77 (2010) 23

In re Papandreou,
139 F.3d 247 (D.C. Cir. 1998) 21, 22

I.T Consultants, Inc. v. *Islamic Republic of Pak.*, 351 F.3d 1184 (D.C. Cir. 2003) 22

Jerome B. Grubart, Inc. v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) 13

Lamar v. *United States*,
240 U.S. 60 (1916) 13

Land v. *Dollar*,
330 U.S. 731 (1947) 15, 16

Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 15-16

Kiobel v. *Royal Dutch Petroleum Co.*,
133 S. Ct. 1659 (2013) 12

Knox v. *Smith*,
45 U.S. 298 (1846) 16

Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Manning*, 136 S. Ct. 1562 (2016) 5, 9, 11, 12

Morrison v. *National Austl. Bank Ltd.*,
561 U.S. 247 (2010) 12

Mastafa v. *Chevron Corp.*,
770 F.3d 170 (2d Cir. 2014) 12

OBB Personenverkehr AG v. *Sachs*,
136 S. Ct. 390 (2015) 7, 10

Oelrichs v. *Spain*,
82 U.S. 211 (1872) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Permanent Mission of India to the United Nations v. *City of N.Y.*, 551 U.S. 193 (2007) 3, 4, 5, 6, 18

Phoenix Consulting, Inc. v. *Republic of Angl.*, 216 F.3d 36 (D.C. Cir. 2000) 4

Powerex Corp. v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007) 14

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 13, 20, 21

Republic of Iraq v. *Beaty*, 556 U.S. 848 (2009) 23

Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 7, 17, 22

Simon v. *Republic of Hung.*, 812 F.3d 127 (D.C. Cir. 2016) 4, 20

Sisson v. *Ruby*, 497 U.S. 358 (1990) 5, 13

Stratton v. *St. Louis Sw. Ry. Co.*, 284 U.S. 530 (1932) 16

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) ..... *passim*

Warfaa v. *Ali*, 811 F.3d 653 (4th Cir. 2016) 12

CONSTITUTIONAL PROVISION:

U.S. Const. art. III, § 2, cl. 1 10

STATUTES:

15 U.S.C. § 78aa(a) 10

28 U.S.C. § 1330(a) 23

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1331 10

28 U.S.C. § 1332(a)(1) 17

28 U.S.C. § 1333(1) 10, 13

28 U.S.C. § 1338(b) 7

28 U.S.C. § 1343(a)(3) 11

28 U.S.C. § 1350 12

28 U.S.C. § 1491(a)(1) 11

28 U.S.C. § 1604 ..... 9, 10, 18

28 U.S.C. § 1605(a)(1) 8, 23

28 U.S.C. § 1605(a)(2) 8, 17

28 U.S.C. § 1605(a)(3) 2, 4, 5, 6, 10, 20

28 U.S.C. § 1605(a)(4) 3, 18

28 U.S.C. § 1605A(c) 22

Act of Feb. 5, 1903,
Pub. L. No. 57-62, § 13, 32 Stat. 797, 800 11

Judicial Code of March 3, 1911,
Pub. L. No. 61-475, § 24, 36 Stat. 1087, 1091 10

Judiciary Act of 1789,
ch. 20, § 16, 1 Stat. 73, 82 16

Sherman Anti-Trust Act of July 2, 1890,
ch. 647, § 4, 26 Stat. 209, 209 10-11

RULE:

Fed. R. Civ. P. 12(b)(6) 4

OTHER AUTHORITY:

Chicago Manual of Style (16th ed. 2010) 2-3

IN THE

Supreme Court of the United States

No. 15-423

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents' brief rests on two basic theories. The first is that the "exceptionally low" pleading standard set forth by the D.C. Circuit, J.A. 178, is the common . nd usual jurisdictional pleading standard, applicable in an FSIA case just as in any other. But there is nothing common or usual about the FSIA. Where subject-matter jurisdiction (or the lack of it) depends on sovereign immunity (or the lack of it), the jurisdictional inquiry must actually *answer the sovereign-immunity question*—not merely hypothesize about the possible existence of an exception to the statutory immunity the FSIA confers.

Respondents' second theory is that the pleading standard proffered by the United States and Venezuela impermissibly merges jurisdiction and merits. But Respondents themselves are constrained to admit that Congress can, and has, introduced substantive, merits-based standards into statutory jurisdictional inquiries. *See* Resp. Br. 42. Congress did just that in the FSIA. To the extent the FSIA's substantive jurisdictional requirements implicate the merits of the underlying claim, it properly remains the prerogative of the sovereign to dispute those requirements at the pleadings stage, later, or not at all.

I. THE COURT SHOULD ADOPT THE PLEADING STANDARD ADVOCATED BY VENEZUELA AND THE UNITED STATES.

Venezuela and the United States offer an interpretation of the FSIA's expropriation exception that is consistent with the exception's text, Court precedent, and the FSIA's history and purpose. A "court must satisfy itself," "[a]t the threshold of every action," *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493-494 (1983), that the rights "in issue" in an FSIA expropriation-exception case qualify as "rights in property taken in violation of international law" within the meaning of 28 U.S.C. § 1605(a)(3). In other words, "rights" must (i) be "in issue," *and* (ii) meet the statutory definition.

This reading follows naturally from the statutory text. The words "rights in property taken in violation of international law are in issue" contain two distinct components. "[I]n issue" and "in property taken in violation of international law" are separate descriptive phrases modifying "rights." *See generally Chicago Manual of Style* § 5.173, at 248 (16th ed.

2010) ("A prepositional phrase consists of a preposition, its object, and any words that modify the object. A prepositional phrase can be used * * * as an adjective."). Grammatically, then, the expropriation exception's language describes two independent elements, each of which must be met to establish jurisdiction.

In this way, the expropriation exception is structured like the FSIA's immovable-property exception, which confers jurisdiction when "rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). We know from *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007), that such "rights" are "in issue" when the plaintiff's claim "directly implicate[s] [those] rights." *Id.* at 201. The words "in issue" thus describe the relationship between the plaintiff's claim and the alleged rights. *See id.* at 198-199. For example, "a suit to establish the validity of a lien implicates 'rights in immovable property'" because a lien "inhibits one of the quintessential rights of property ownership—the right to convey." *Id.* But "claims incidental to property ownership, such as actions involving an 'injury suffered in a fall' on the property," do not place rights in immovable property "in issue" because the link between the property rights and the claim is not sufficiently "direct[]." *Id.* at 201 (citation omitted).

Permanent Mission separately determined that the right alleged in that case—a tax lien—qualified as a "right[] in immovable property." *Id.* at 198.[1] It

---

[1] *Permanent Mission* held that the exception was not limited "to cases in which the specific right at issue is title, ownership, or

reached its decision through an analysis similar to that applied to legal questions under Federal Rule of Civil Procedure 12(b)(6): the Court reviewed the relevant legal authorities and concluded that, under those authorities, "liens" are "interests in property." 551 U.S. at 198. The complaint therefore pleaded rights within the statutory definition, satisfying the jurisdictional pleading requirement. *Id.* at 197.

The expropriation exception similarly requires that certain "rights *** are in issue," and similarly includes a statutory definition of those rights. 28 U.S.C. § 1605(a)(3). The same standard articulated in *Permanent Mission* therefore should apply to the expropriation exception. A plaintiff's claim must directly implicate rights that legally constitute "rights in property taken in violation of international law." *See Simon* v. *Republic of Hung.*, 812 F.3d 127, 148 (D.C. Cir. 2016) (describing analysis as "similar to that of Rule 12(b)(6)").

This standard comports with the FSIA's underlying purpose. It allows courts to "make the critical preliminary determination of [their] own jurisdiction as early in the litigation as possible," which "preserve[s] the full scope of [sovereign] immunity." *Phoenix Consulting, Inc.* v. *Republic of Angl.*, 216 F.3d 36, 39 (D.C. Cir. 2000) (quotation marks omitted). That is just what the FSIA is supposed to do: give foreign states "some protection from the inconvenience of suit as a gesture of comity between the United States

---

possession," *in toto*. 551 U.S. at 198. Rather, the disputed right could be a *component* of one of those sources of property rights, such as "one of the quintessential rights of property ownership—the right to convey." *Id.*

and other sovereigns." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003).

II. *BELL* DOES NOT APPLY TO EXPROPRIATION-EXCEPTION PLEADINGS.

Respondents argue that a claimant adequately pleads jurisdiction under the expropriation exception if the plaintiff's allegations of "rights in property taken in violation of international law," 28 U.S.C. § 1605(a)(3), are not "wholly insubstantial and frivolous," *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). This standard is inconsistent with all of the benchmarks described above: the FSIA's text, its history and purpose, and this Court's precedents.

A. Respondents' Text-Based Arguments Are Weak At Best And Contradictory At Worst.

Any proper interpretation of the FSIA should "begin, as always, with the text of the statute." *Permanent Mission*, 551 U.S. at 197. Respondents, however, discuss every statute they can *other* than the FSIA before getting around to the Act itself. *See* Resp. Br. 15-27. When they finally address the expropriation exception, they offer two contradictory arguments. *First*, they contend that *Bell* applies to a wide range of jurisdictional statutes because it is required by the "very 'nature of the jurisdictional inquiry'" rather than a "provision's particular phrasing." *Id.* at 17, 19 (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1570 (2016); *Sisson* v. *Ruby*, 497 U.S. 358, 365 (1990)). We address and refute that overbroad notion below (at 11-12, 14-20).

Second, Respondents argue the exact opposite: that the particular phrasing of the expropriation exception *does* matter, and Congress used "the phrase 'in issue'" in the exception "to describe what the parties contested." *Id.* at 30. This argument is no more availing than the first. The expropriation exception requires both that rights are "in issue" *and* that those rights are "in property taken in violation of international law." 28 U.S.C. § 1605(a)(3). Respondents nonetheless claim that immunity is defeated, and jurisdiction established, whenever "one side asserts a taking of rights in property in violation of international law and the other side denies it." Resp. Br. 29. That reading disregards half the statute. Its singular focus on the existence of a dispute fails to give independent meaning to the statutory definition describing what the dispute must be *about*: "rights in property taken in violation of international law." It also makes no sense. Under Respondent's logic, jurisdiction would be *defeated* if the foreign state *admitted* the alleged taking. And, Respondents' rule is inconsistent with *Permanent Mission*, which interpreted the words "in issue" to require a direct relationship between the plaintiff's claim and the alleged rights—not the mere existence of disputed pleadings. *See supra* at 3.

Respondents' interpretation also requires some targeted edits to the FSIA's text. Respondents contend that the expropriation exception confers jurisdiction whenever the plaintiff "puts 'in issue' *a claim* that the plaintiff's rights in property have been taken in violation of international law." Resp. Br. 3 (emphasis added); *accord id.* at 14, 28. That is not what the statute says. Section 1605(a)(3) instructs that what must be "in issue" *are* "rights in property

taken in violation of international law," *not* a mere "*claim* that the plaintiff's rights in property have been taken in violation of international law." When Congress wishes to confer jurisdiction whenever a plaintiff asserts a particular *claim*, it knows how to do so. *See, e.g.*, 28 U.S.C. § 1338(b) ("The district courts shall have original jurisdiction of *any civil action asserting a claim* of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws." (emphasis added)); *infra* at 11. Congress did not include similar language in the expropriation exception. It created a substantive standard.

Two practical reasons also compel rejection of Respondents' statutory interpretation. *First*, Respondents reduce the expropriation exception to a provision defeating immunity, and conferring jurisdiction, whenever the parties disagree over the meaning of the statutory text; that is, whether "rights in property taken in violation of international law are in issue." *See* Resp. Br. 29. But that view extinguishes the proper division between the roles of parties and courts. *Parties* place disputed matters in issue. *Courts* have the "judicial responsibility to determine" what statutory requirements mean. *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 359 (1993). Properly construed, then, the expropriation exception requires the plaintiff to plead the necessary jurisdictional elements, and the court to determine whether the plaintiff's pleaded facts "qualify as" the necessary elements. *Id.* at 361. *See also OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 398 (2015) (requiring plaintiff "to demonstrate that her suit falls within the commercial activity exception").

Second, Respondents' statutory interpretation is complicated and impractical. According to them, no one pleading standard applies to all FSIA exceptions. Instead, the applicable standard depends on at least "three types of conditions" the pleaded exception may incorporate—two requiring a particular nexus, one requiring a type of claim. Resp. Br. 37. (We say *at least* three because Respondents' described categories do not account for the waiver exception, 28 U.S.C. § 1605(a)(1), or the commercial-activity exception's requirement that "the action is based upon a commercial activity," *id.* § 1605(a)(2).[2]) And because (according to Respondents) more than one type of condition may exist even within a single exception, a court must dissect the relevant exception and separately categorize its requirements. *See* Resp. Br. 37. But even *that* analysis might not resolve the pleading-standard question, because the answer may depend on whether the plaintiff has alleged the statutory jurisdictional standard as a cause of action—although Respondents are unclear on this point. *See id.* at 51 & n.11. This multi-step and indeterminate process has no place in interpretation of a law designed to promote uniformity. *See Verlinden*, 461 U.S. at 489.

---

[2] The under-inclusiveness of Respondents' three categories reflects their contention that the FSIA's only substantive components are its nexus requirements. *See* Resp. Br. 38-39 (citing snippets of *Verlinden*). Incorrect. Only *one aspect* of the FSIA's "substantive provisions" is that they typically "requir[e] some form of substantial contact with the United States." *Verlinden*, 416 U.S. at 490 & n.15.

B. Respondents' Analogies To Other Statutes Are Misplaced.

Apart from their textual arguments, Respondents assert that *Bell*'s pleading standard applies to the expropriation exception because it applies to other federal jurisdictional statutes. *See* Resp. Br. 19-27. But the FSIA is not like other jurisdictional statutes; its text, history, and purpose are qualitatively different.

1. Most jurisdictional statutes "maintain the constitutional balance between state and federal judiciaries" by determining in which court system a plaintiff may bring suit—which is to say, they assign *where* a suit may be brought. *Manning*, 136 S. Ct. at 1573. The FSIA, in sharp contrast, dictates whether a suit may be brought at all. It is "the sole basis for obtaining jurisdiction over a foreign state in" state *or* federal court, and therefore accounts for foreign-policy concerns unique to suits against foreign states. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *see Verlinden*, 461 U.S. at 493. Unlike other statutes that merely "grant jurisdiction over a particular class of cases," *Verlinden*, 461 U.S. at 496, the FSIA is a "comprehensive regulatory statute" that "codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law," *id.* at 497. And unlike other statutes, the FSIA begins with a presumption of immunity that may be overcome only in certain specified and limited circumstances. 28 U.S.C. § 1604.

Respondents largely ignore these differences, giving particularly short shrift to the FSIA's presumption of immunity—a characteristic of the statute this Court twice reaffirmed just last Term. *Bank Marka-*

zi v. *Peterson*, 136 S. Ct. 1310, 1317 n.1 (2016); *OBB Personenverkehr*, 136 S. Ct. at 394. Indeed, Respondents do not even cite 28 U.S.C. § 1604, apparently on the theory that the presumption of immunity falls away whenever a case "implicate[s] an exception." Resp. Br. 44. But that is the problem. The statutory presumption of immunity is not defeated by a plaintiff's mere invocation of an FSIA exception. A "court must satisfy itself that one of the exceptions applies"—not simply take the plaintiff's word for it. *Verlinden*, 461 U.S. at 494.

2. a. The statutes Respondents cite are not textually analogous to the expropriation exception, in any event. *See* Resp. Br. 15-27. None includes anything close to the "detailed," "substantive" standards contained in the expropriation exception. *Verlinden*, 461 U.S. at 494, 498. And none contains a jurisdictional predicate equivalent to the exception's requirement that the rights "in issue" are "rights in property taken in violation of international law." 28 U.S.C. § 1605(a)(3).

Some of Respondents' cited statutes broadly confer jurisdiction over a general subject matter. 28 U.S.C. § 1333(1) ("[a]ny civil case of admiralty or maritime jurisdiction"); Judicial Code of March 3, 1911, Pub. L. No. 61-475, § 24, 36 Stat. 1087, 1091 ("all crimes and offenses cognizable under the authority of the United States"). Others require only that the case present a substantial question of a particular type of law. U.S. Const. art. III, § 2, cl. 1 (cases "arising under" federal law); 28 U.S.C. § 1331 (same). Others grant jurisdiction where the plaintiff is asking the court to take a specified action. 15 U.S.C. § 78aa(a) ("all suits in equity and actions at law brought to enforce any liability or duty created by this chapter"); Sherman Anti-

Trust Act of July 2, 1890, ch. 647, § 4, 26 Stat. 209, 209 ("to prevent and restrain violations of this act"); Act of Feb. 5, 1903, Pub. L. No. 57-62, § 13, 32 Stat. 797, 800 (cases by bankruptcy trustees to void a bankrupt's preference and to "recover the property or its value from such person"). Another requires only that federal law authorize the action. 28 U.S.C. § 1343(a)(3) ("any civil action authorized by law to be commenced by any person" to redress civil-rights violations). The expropriation exception shares none of these features.

That leaves the Tucker Act—the sole sovereign-immunity-related statute that Respondents cite, other than the FSIA itself. But the Tucker Act includes the words that Respondents would *add* to the expropriation exception to support their reading, granting the Court of Federal Claims authority "to render judgment upon *any claim* against the United States founded *** upon" specified sources of law. 28 U.S.C. § 1491(a)(1) (emphasis added). The expropriation exception does not grant jurisdiction over "any claim." It imposes a substantive standard that the plaintiff must meet to extinguish immunity, and thus to trigger jurisdiction. *See Verlinden*, 461 U.S. at 498.

Respondents attempt to overcome this problem by asserting that this Court is not concerned with a jurisdictional "provision's particular phrasing." Resp. Br. 17 (quoting *Manning*, 136 S. Ct. at 1570). Quite the contrary. The Court in *Manning* explained that its interpretation of *the federal-question statute* was not dependent on that statute's "particular phrasing." 136 S. Ct. at 1570. But the *Manning* Court also explained that, out of respect for the federal-state jurisdictional divide, "this Court has time and again

declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires." *Id.* at 1573. This canon applies with even greater force to the FSIA. The Act dictates not merely on which side of the federal-state divide a lawsuit may be filed, but *whether* a foreign state is subject to suit in the United States at all, in any court. That determination implicates "sensitive issues concerning the foreign relations of the United States" not present in any other jurisdictional statute. *Verlinden*, 461 U.S. at 493. And that is why the "particular phrasing" of the FSIA *does* matter: statutes relating to foreign sovereign immunity are "an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper." *Bank Markazi*, 136 S. Ct. at 1328.

b. The cases interpreting other jurisdictional statutes do not help Respondents, either. Several simply explain the difference between merits and jurisdictional dismissals. *See, e.g.*, *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 253-254 (2010) (dismissal on ground that the Securities Exchange Act lacks extraterritorial reach is on the merits)[3];

---

[3] Extraterritoriality is not *always* a merits issue, however. Following the holding in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), that the Alien Tort Statute (ATS), 28 U.S.C. § 1350, does not apply extraterritorially, federal courts of appeals have treated ATS extraterritoriality as a jurisdictional issue, due to the "singular character of the ATS as a jurisdictional statute," *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 179 (2d Cir. 2014). *See also Doe* v. *Drummond Co.*, 782 F.3d 576, 600 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016); *Warfaa* v. *Ali*, 811 F.3d 653, 661 (4th Cir. 2016), *pet. for cert. filed*, Nos. 15-1345, 15-1464 (May 2 & June 3, 2016).

Binderup v. *Pathe Exch., Inc.*, 263 U.S. 291, 304-308 (1923) (dismissal for failure to state a cause of action is a merits dismissal); *Flanders* v. *Coleman*, 250 U.S. 223, 228-229 (1919) (jurisdictional dismissal must depend on "the grounds upon which federal jurisdiction is invoked" rather than "the conclusion on the merits of the action"). Others address *factual* disputes and stand only for the proposition that "the truth of jurisdictional allegations" need not "always be determined with finality at the threshold of litigation," but instead may be addressed through a "comparatively summary procedure before a judge alone," and then resolved conclusively "after the first jurisdictional skirmish," at the judge's discretion. *E.g.*, *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537-538 & n.3 (1995). But factual jurisdictional disputes are not before the Court in this case.

Respondents' remaining cited cases are those distinguishing statutory requirements that are jurisdictional from those that go to the merits. *See, e.g.*, *Sisson*, 497 U.S. at 365 (explaining that 28 U.S.C. § 1333(1) requires a substantial relationship between the disputed conduct and maritime activity, such that a court should examine only the "general character of the activity" in question at the jurisdictional stage, leaving more particular focus on "the causes of the harm" to the "merits"); *Lamar* v. *United States*, 240 U.S. 60, 64-65 (1916) (explaining that an "objection that the indictment does not charge a crime against the United States goes only to the merits of the case"). But the FSIA's exception is not akin to these mixed-question statutes; its requirements are indisputably jurisdictional. *See Republic of Austria* v. *Altmann*, 541 U.S. 677, 695 n.15 (2004); *Verlinden*,

461 U.S. at 489. Respondents' cited cases, which do not discuss statutes otherwise analogous to the expropriation exception, are thus irrelevant.

C. *Bell* Is Not A Universal Rule Of Jurisdictional Pleading.

Because the statute gives them little quarter and other statutes provide little help by way of analogy, Respondents are left to contend that the *Bell* standard applies to the FSIA's jurisdictional inquiry because it is a universal jurisdictional principle. *See* Resp. Br. 27. But *Bell itself* suggested that its "wholly insubstantial and frivolous" standard might better be described as a practical rule of judicial administration arising out of federalism concerns, rather than a jurisdictional doctrine. *See* 327 U.S. at 682-683. In any event, this Court has already rejected Respondents' reasoning—in the context of the FSIA, no less.

1. Respondents argue that courts should apply universal jurisdictional rules in all cases, absent express statutory instruction to the contrary. Resp. Br. 27 (citing *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007), a case about how to resolve arguably conflicting *statutes*). But they struggle to identify the supposed universal jurisdictional principle applicable here. The first contender is their blanket statement that "subject-matter jurisdiction does not turn on the merits." *Id.* at 15 (capitalization altered). But even Respondents themselves understand that this is not so; for as they elsewhere explain, "the jurisdictional inquiry" may "touch on issues that relate also to the merits." *Id.* at 42. Indeed, Congress regularly "exercise[s] its prerogative to restrict the subject-matter jurisdiction of federal

district courts based on a wide variety of factors, some of them also relevant to the merits of a case." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006).

Land v. *Dollar*, 330 U.S. 731 (1947)—a case concerning the United States' sovereign immunity—is a close analogy. There, "the question of jurisdiction [wa]s dependent on decision of the merits." *Id.* at 735. The plaintiffs argued that U.S. Maritime Commissioners unlawfully refused to return their shares of stock. *Id.* at 733. To determine whether the plaintiffs' allegations overcame the United States' sovereign immunity, the Court applied the pleading standard Venezuela and the United States advocate here. It first "assume[d] the allegations of the complaint are proved." *Id.* at 737. It then asked whether those allegations were legally sufficient to state a basis for overcoming sovereign immunity and answered affirmatively: "if the allegations of the [complaint] are true, the shares of stock never were property of the United States and are being wrongfully withheld by [the Commissioners] who acted in excess of their authority as public officers." *Id.* at 738. Because the allegations were legally adequate to confer jurisdiction, the Court remanded the case, instructing the district court to determine the proper "mode" to resolve the factual disputes underlying the jurisdictional and merits inquiries. *Id.* at 735 n.4. As the Court explained, "the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." *Land*, 330 U.S. at 739.[4]

---

[4] The Court later concluded that a federal officer's tortious conduct does not suffice to overcome sovereign immunity, *Larson* v.

As another example, the Judiciary Act of 1789 provided that "suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law." *Oelrichs* v. *Spain*, 82 U.S. 211, 228 (1872) (quoting Section 16 of the Act). Although the adequacy of a particular remedy normally would be a merits decision, the Judiciary Act required courts, as a jurisdictional matter, to determine "the character of the right" alleged, whether there was "a legal remedy" for that right, and whether "its adequacy * * * defeat[ed] * * * equity jurisdiction." *Stratton* v. *St. Louis Sw. Ry. Co.*, 284 U.S. 530, 534 (1932); *see also, e.g.*, *Oelrichs*, 82 U.S. at 227-228; *Knox* v. *Smith*, 45 U.S. 298, 316 (1846).[5]

2. Having failed to establish a universal divide between jurisdictional issues and merits issues, Respondents make the lesser-included argument that the Court should apply *Bell* to the FSIA because *Bell* governs statutes conferring jurisdiction over a particular "class of cases" or "type[] of action." Resp. Br. 1, 14, 37-39 (discussing examples of statutes governing a general subject matter or cases sharing a defined feature). That characterization of *Bell*'s reach is still too broad. The diversity statute, for example, can equally be described as conferring jurisdiction over a class of cases or type of action—those where, among other things, the plaintiff and the de-

---

Domestic & Foreign Commerce Corp., 337 U.S. 682, 692-705 (1949), but otherwise left undisturbed *Land*'s reasoning.

[5] This statute, and the Court's analysis of it, belie Respondents' contention that it is overly burdensome for a court presented with an FSIA expropriation-exception case to determine at the jurisdictional stage whether compensation for expropriated property was "prompt, adequate, and effective." Resp. Br. 45.

fendant are "citizens of different States." 28 U.S.C. § 1332(a)(1). But *Bell* does not apply to allegations of citizenship. This Court has long required the pleadings in a diversity case to include legally adequate allegations establishing the required diversity. *See, e.g.*, *City of Indianapolis* v. *Chase Nat'l Bank of City of N.Y.*, 314 U.S. 63, 69 (1941); *Hennessy* v. *Richardson Drug Co.*, 189 U.S. 25, 35 (1903); *Everhart* v. *Huntsville Female Coll.*, 120 U.S. 223, 224 (1887).

Nor does *Bell* apply to the FSIA exceptions that describe "the types of actions for which foreign sovereigns may be held liable in a court in the United States." *Verlinden*, 461 U.S. at 496-497. For instance, Respondents do not dispute that *Bell* is inapplicable to the expropriation exception's nexus prong. *See* Resp. Br. 48. They also do not dispute that *Bell* is inapplicable to the commercial-activity exception, which confers jurisdiction over actions "based upon a commercial activity" with the requisite nexus to the United States. 28 U.S.C. § 1605(a)(2). Respondents instead argue that this Court's decisions interpreting that exception are distinguishable because they "did not examine whether the actions fell within a defined class." Resp. Br. 40. But that is *exactly* what they did. The *Nelson* Court, for example, evaluated the plaintiffs' pleadings, determined that "the basis for the [plaintiffs'] suit" was the foreign-state defendants' sovereign—and allegedly tortious—conduct, and concluded that the action was not the type over which Section 1605(a)(2) conferred jurisdiction because "tortious conduct * * * fails to qualify as 'commercial activity' within the meaning of the Act." 507 U.S. at 358.

Bell likewise does not apply to the immovable-property exception, which this Court interpreted in

Permanent Mission. *See supra* at 3-4. Respondents minimize the importance of *Permanent Mission* by arguing that the Court did not consider whether the foreign state's immunity defense was jurisdictional or merits-based. Resp. Br. 43. That is again not so. The *Permanent Mission* Court made clear that "the only question before us is one of jurisdiction." 551 U.S. at 202 n.2.

Respondents also claim that *Permanent Mission* supports their argument because the Court declined to consider at the jurisdictional stage the "merits" question of "whether [the foreign state is] actually responsible for paying the taxes." *Id.*; *see* Resp. Br. 43. That point does not distinguish *Permanent Mission* from this case in the slightest. A foreign state's ultimate responsibility for paying taxes is not part of the jurisdictional standard under the immovable-property exception, *see* 28 U.S.C. § 1605(a)(4); therefore, the Court did not resolve that issue at the jurisdictional stage.

3. a. Receding still further in their third attempt, Respondents offer yet a narrower rule: perhaps *Bell* can be read to apply when a statute "confers jurisdiction over a particular type of claim." Resp. Br. 16; *accord id.* at 28, 30, 37-38, 40-41, 46. Respondents once again overstate *Bell*'s scope.

In *Amerada Hess*, this Court construed 28 U.S.C. § 1604 to contain an "exception" to foreign sovereign immunity for actions brought pursuant to "existing international agreements to which the United States is a party at the time of enactment of this Act." *Id.*; *Amerada Hess*, 488 U.S. at 442. *Cf.* Resp. Br. 41 n.9. If Respondents are correct, *Bell* should apply to Section 1604 because it establishes jurisdiction over "a

particular type of claim," Resp. Br. 16—that is, a claim brought pursuant to an international agreement, to which the United States was a party when the FSIA was enacted, and which waives the foreign state's sovereign immunity. To use Respondents' (quoted) words, an FSIA plaintiff's rights under the international agreement "may be defeated by one construction * * * and sustained by the opposite construction." *Id.* (citation omitted). Under this reasoning, jurisdiction would be established in *Amerada Hess* if the plaintiffs had nonfrivolously alleged that the defined international agreements conferred a right of action.

But that is not the test *Amerada Hess* applied. The Court instead evaluated whether the international agreements cited by the plaintiffs gave "foreign corporations" like plaintiffs "private rights of action * * * to recover compensation from foreign states in United States courts" and found that "[t]hey do not." 488 U.S. at 442. It therefore concluded that "none of the enumerated exceptions to the Act apply to the facts of this case." *Id.* at 443.

b. Separately, even if Respondents were right about their now something-much-less-than-universal rule that *Bell* applies to jurisdictional statutes requiring plaintiffs to state a particular claim, even *that* rule would not apply to the expropriation exception. Respondents' theory rests on the assumption that a plaintiff pleading jurisdiction under the expropriation exception *must* plead as their cause of action an "'expropriation claim[]' seeking redress for 'nationalization or expropriation of property.'" Resp. Br. 37; *see* Resp. Supp. Br. 4 (distinguishing the expropriation exception from FSIA exceptions that "d[o] not fully overlap with the merits of the claims").

But nothing in the statute or Court precedent supports that assumption.

The expropriation exception does not specify the cause of action that a plaintiff must plead. Indeed, in *Altmann*, the Court *distinguished* the FSIA from the type of statute that imposes a "'jurisdictional' limitation" that "adheres to [a] cause of action." 541 U.S. at 695 n.15. The FSIA, the Court explained, "does not create or modify any causes of action." *Id.* So, in *Altmann*, the plaintiff pleaded jurisdiction under the expropriation exception and asserted a variety of claims, including for declaratory relief, replevin, rescission, conversion, imposition of a constructive trust, and disgorgement. *Id.* at 685 n.4. Similarly, the plaintiff in *Simon* pleaded jurisdiction under the expropriation exception and alleged "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution," but no cause of action for a violation for international law. 812 F.3d 127, 141. Although the statutory requirement that the claims directly implicate "rights in property taken in violation of international law," 28 U.S.C. § 1605(a)(3), was a necessary *jurisdictional characteristic* of their claims, it was not an *element* of all causes of action in *Altmann*, nor was it an element of any causes of action in *Simon*. The expropriation exception thus does not fall within Respondents' rule even as they articulate it.

D. The FSIA's History And Purpose, As Well As Practical Considerations, Support The Conclusion That *Bell* Does Not Apply To The Expropriation Exception.

1. The FSIA's history and purpose support the view that this Court should apply the same pleading

standard to the expropriation exception that it has applied to other FSIA exceptions. *See* Pet'rs Br. 34-48; U.S. Merits-Stage Br. 19-32. A foreign state should be able to challenge the legal sufficiency of the substance of a plaintiff's jurisdictional allegations "[a]t the threshold of every action," *Verlinden*, 461 U.S. at 493, to potentially avoid *all* discovery and secure a swift dismissal, *see In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998). Conversely, a plaintiff should not be able to secure *Bell*'s "exceptionally low" standard of review, J.A. 178, through artful pleading—to take one relevant example, merely by reciting the expropriation exception's language as a cause of action.

The artful-pleading problem cannot be remedied simply by applying *Bell* regardless of the plaintiff's cause of action. *See* Resp. Br. 51 n.11. That would gut the "taking in violation of international law" requirement of meaning in cases where a plaintiff pleaded only common-law causes of action such as unjust enrichment. So long as the plaintiff alleged a supposed violation of international law that was not "completely foreclose[d]" by binding precedent, J.A. 182, jurisdiction would be satisfied, and the court might never determine whether there was an *actual* violation of international law—rendering that part of the expropriation exception a nullity.

2. Respondents counter by arguing that *Bell* should apply because it is most consistent with Congress's supposed intent to allow U.S. courts to decide expropriation claims on the merits. Resp. Br. 32-37. But the statute only removes immunity when the requirements of the expropriation exception are met. It does not facilitate a merits decision by creating a cause of action. *See Altmann*, 541 U.S. at 695 n.15.

Cf. 28 U.S.C. § 1605A(c) (creating a private right of action for terrorism-related injuries). In any event, *all* FSIA exceptions reflect circumstances where Congress concluded that foreign sovereign immunity should be abrogated. This point says nothing about how jurisdictional pleadings should be reviewed.

3. Respondents also maintain that a rule requiring courts to decide whether the allegations of a complaint, if accepted as true, satisfy the substantive requirements of the expropriation exception would frontload substantially more burdensome litigation. Resp. Br. 44-51. This argument rests on three flawed contentions.

First, Respondents characterize as a problem the fact that Venezuela's and the United States' rule would require a court "to interpret and apply [the FSIA's] legal requirements." *Id.* at 45. But that is precisely what this Court *already* requires: "applying [the FSIA's] standards will generally require interpretation of numerous points of federal law." *Verlinden*, 461 U.S. at 497. It is a court's "judicial responsibility" to interpret these standards, including at the pleading stage. *Nelson*, 507 U.S. at 358.

Second, Respondents contend that, under Venezuela's and the United States' view, a court must satisfy itself that all jurisdictional facts are true whenever jurisdiction is challenged. That is not so. A foreign state may (as here) elect to challenge first only the legal sufficiency of the pleadings to resolve the immunity question as early in the litigation, with as little expenditure of resources, as possible. *See I.T. Consultants, Inc.* v *Islamic Republic of Pak.*, 351 F.3d 1184, 1188 (D.C. Cir. 2003); *Papandreou*, 139 F.3d at 254. Or it may choose to dispute jurisdic-

tional facts, such as the nexus prong of the expropriation exception. *See* U.S. Merits Br. 14 n.2; *cf. Hertz Corp.* v. *Friend*, 559 U.S. 77, 96-97 (2010) (citing diversity cases with factual disputes about citizenship). But that causes no major disruption; the court decides both jurisdiction and the merits anyway. *See* 28 U.S.C. § 1330(a).

Third and finally, Respondents argue that Venezuela's and the United States' rule would require courts to decide "merits" issues *sua sponte*. Resp. Br. 47. The statute itself refutes that argument: a foreign state may "waive[] its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1)—for example, by "fil[ing] a responsive pleading in an action without raising the defense of sovereign immunity," *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (citation omitted). And when a foreign state waives its immunity, the FSIA confers jurisdiction in U.S. courts. 28 U.S.C. § 1605(a)(1). Respondents offer no support for the proposition that a court is obligated to raise issues of foreign sovereign immunity *sua sponte* where a foreign state is participating in the litigation.

* * *

Under the FSIA, foreign states are "presumptively," "normally," and "ordinarily" immune from the jurisdiction of U.S. courts. *Bank Markazi*, 136 S. Ct. at 1317 n.1; *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009); *Verlinden*, 461 U.S. at 488. The pleading standard Respondents advocate would replace that presumption of immunity with a presumption of *jurisdiction*—one satisfied merely by articulating a claim to an FSIA jurisdictional exception that can

pass a Rule 11 straight-face test. The FSIA's text, history, purpose, and past precedents all say otherwise.

CONCLUSION

For the foregoing reasons, and those in Venezuela's opening brief and that of the United States, the decision below should be reversed. *See Ashcroft* v. *Iqbal*, 556 U.S. 662, 687 (2009). Alternatively, the judgment should be vacated and the case remanded with instructions that the court of appeals apply the correct pleading standard.

Respectfully submitted,

JOSEPH D. PIZZURRO
ROBERT B. GARCÍA
KEVIN A. MEEHAN
CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178

BRUCE D. OAKLEY
Counsel of Record
HOGAN LOVELLS US LLP
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

WILLIAM L. MONTS, III
CATHERINE E. STETSON
MARY HELEN WIMBERLY
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Petitioners

OCTOBER 21, 2016

Supreme Court, U.S.
FILED
JUN - 6 2016

No. 15-423

IN THE

Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
AND PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
AND HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
BLAKE C. ROBERTS
MOLLY M. JENNINGS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE BELL ISSUE DOES NOT MERIT REVIEW 2

A. The Government's Assertion Of A Circuit Conflict Is Mistaken 2

B. The D.C. Circuit's Approach Does Not Conflict With This Court's Precedent 6

II. THE GOVERNMENT IS CORRECT THAT THE OTHER QUESTIONS PRESENTED DO NOT WARRANT REVIEW 9

A. H&P-V's Claim Does Not Merit Review 9

B. H&P-IDC's Claim Does Not Warrant Review 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Abelesz v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012) 5

Agudas Chasidei Chabad v. *Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) 2, 3, 4, 5, 8

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 8

Banco Nacional de Cuba v. *Farr*, 383 F.2d 166 (2d Cir. 1967) 9

Banco Nacional de Cuba v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962) 9

Bell v. *Hood*, 327 U.S. 678 (1946) 2

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 7

Cassirer v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) 5

City of New York v. *Permanent Mission of India to the United Nations*, 618 F.3d 172 (2d Cir. 2010) 7

de Sanchez v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985) 5

FG Hemisphere Associates v. *Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Mezerhane v. *Republica Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015) 5

Permanent Mission of India to the United Nations v. *City of New York*, 551 U.S. 193 (2007) 6, 7

Phoenix Consulting v. *Republic of Angola*, 216 F.3d 36 (D.C. Cir. 2000) 2, 3

Robinson v. *Government of Malaysia*, 269 F.3d 133 (2d Cir. 2001) 4, 6

Siderman de Blake v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) 5

Simon v. *Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) 2, 3, 5, 7

Steel Co. v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) 7, 8

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 8

West v. *Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987) 5

Zappia Middle East Construction v. *Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000) 3

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

Permanent Mission of India to the United Nations v. *City of New York*, No. 06-134 (U.S.) 7

STATUTES AND RULES

28 U.S.C. §1605 ..... 3, 4, 7

Vz. Commercial Code, art. 280(4) 11

Fed. R. Civ. P. 12 6

OTHER AUTHORITIES

Fletcher Cyclopedia of the Law of Corporations (2013 rev. ed.) 11

Restatement (Second) of Foreign Relations Law (1965) 10

Restatement (Third) of Foreign Relations Law (1987) 8, 10

INTRODUCTION

Respondents filed this action nearly five years ago to seek redress for petitioners' uncompensated taking of their entire Venezuelan drilling business, worth hundreds of millions of dollars. Respondents assert jurisdiction under the expropriation exception of the Foreign Sovereign Immunities Act ("FSIA"), which abrogates foreign sovereign immunity "in any case ... in which rights in property taken in violation of international law are in issue" and where a nexus with the United States exists. Petitioners advanced several defenses to jurisdiction, many of which remain unresolved. Opp. 29-30.

The government agrees with respondents that the primary international-law questions presented in the petition implicate no division among the circuits and do not warrant review. The government nonetheless recommends that the Court further delay this case—still at the threshold after five years—solely to address the standard of review that Judge Tatel, joined by Chief Judge Garland, applied in analyzing those issues. But the government's recommendation is based on a clear misunderstanding of the court of appeals' approach. The D.C. Circuit applies that standard only in a narrow set of cases. When properly understood, the court's approach does not conflict with any decision of this Court or the other circuits and in no way warrants this Court's review. The Court should decline the government's suggestion and allow respondents' claims to go forward.

I. THE *BELL* ISSUE DOES NOT MERIT REVIEW

A. The Government's Assertion Of A Circuit Conflict Is Mistaken

Under *Bell* v. *Hood*, 327 U.S. 678, 682 (1946), subject-matter jurisdiction "is not defeated" by the possibility that a claim might fail on the merits. Because merits issues "must be decided after and not before the court has assumed jurisdiction over the controversy," a court should not dismiss an action for lack of jurisdiction based on the merits unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where [the] claim is wholly insubstantial and frivolous." *Id.* at 682-683.

The D.C. Circuit applies *Bell* in a narrow category of FSIA cases: those in which both (1) the defendant argues on legal grounds that the plaintiff has not asserted the type of claim to which the expropriation exception applies, and (2) the jurisdictional inquiry fully overlaps with the merits determination. *Simon* v. *Republic of Hungary*, 812 F.3d 127, 140 (D.C. Cir. 2016); *Agudas Chasidei Chabad* v. *Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008). As the government acknowledges, the D.C. Circuit does not apply *Bell* "[w]hen the foreign state challenges the factual basis for jurisdiction"; in that circumstance, courts must "go beyond the pleadings and resolve disputed issues of fact necessary to determine jurisdiction." U.S. Br. 8 n.2; *see Phoenix Consulting* v. *Republic of Angola*, 216 F.3d 36, 40-41 (D.C. Cir. 2000); *Agudas*, 528 F.3d at 940 (where "jurisdiction depends on particular factual propositions (at least those independent of the merits), the plaintiff must, on a challenge by the defendant, present ade-

quate supporting evidence").[1] Similarly, as the government acknowledges, the D.C. Circuit "will not apply" *Bell* where "'the jurisdictional and merits inquiries do not overlap'" and the concerns animating *Bell* do not arise. U.S. Br. 12 n.5; *see Simon*, 812 F.3d at 140-141.

The government contends (at 13-15) that the D.C. Circuit's application of *Bell* conflicts with other courts' approach to evaluating jurisdiction under the expropriation exception. That assertion is incorrect. None of the decisions the government cites presents circumstances in which the D.C. Circuit applies *Bell*, none would be analyzed differently in the D.C. Circuit, and none considered whether *Bell* should apply in a case like this one.

In *Zappia Middle East Construction* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 251-252 (2d Cir. 2000), the plaintiff sought to establish a taking in violation of international law by alleging an alter-ego relationship between two private entities and the sovereign defendant. The defendants challenged the factual basis of the alter-ego theory, and after two years of jurisdictional discovery, the district court dismissed the suit for "fail[ure] to establish facts sufficient to bring the action within the purview of the expropriation exception." *Id.* at 249. The D.C. Circuit would have taken the same approach without applying *Bell*. *See Phoenix Consulting*, 216 F.3d at 40-41; *Agudas*, 528 F.3d at 940.

---

[1] Here, for example, petitioners dispute whether the expropriated property "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. §1605(a)(3). That challenge will be resolved based on the available evidence after "carefully controlled and limited" jurisdictional discovery, without reference to *Bell*. *Phoenix Consulting*, 216 F.3d at 40; *see Agudas*, 528 F.3d at 940.

Similarly, in *Robinson* v. *Government of Malaysia*, 269 F.3d 133, 145 (2d Cir. 2001), the defendant argued that the plaintiff had not "pleaded or c[o]me forward with evidence sufficient to show" that his claim fell within the FSIA's non-discretionary torts exception, 28 U.S.C. §1605(a)(5)—an exception that did not fully overlap with the merits of the claims, 269 F.3d at 140-141. The Second Circuit invoked the standard for "resolv[ing] a factual dispute" and in doing so relied heavily on the D.C. Circuit's decision in *Phoenix Consulting*. *Id.* at 140-141. The D.C. Circuit in turn has cited *Robinson* and other Second Circuit decisions with approval in discussing the standard governing factual challenges to FSIA jurisdiction. *FG Hemisphere Assocs.* v. *Democratic Republic of Congo*, 447 F.3d 835, 843 (D.C. Cir. 2006); *Agudas*, 528 F.3d at 940.

The government cites (at 14) language in *Robinson* indicating that the Second Circuit would follow *Phoenix Consulting* to evaluate factual challenges to jurisdiction even when that inquiry overlaps with the merits. *Robinson*, 269 F.3d at 141-143; *see id.* at 148 (Sotomayor, J., concurring in the judgment) (criticizing that suggestion). That language also poses no conflict, because the D.C. Circuit has expressly reserved the question of what standard applies "when jurisdiction depends on factual propositions intertwined with the merits of the claim." *Agudas*, 528 F.3d at 940. Moreover, that question is not presented here because petitioners stipulated that the jurisdictional issues addressed in the decision below would be litigated based on the complaint's undisputed allegations. Pet. App. 9a, 47a-48a.

The remaining decisions cited by the government also would not have been analyzed differently in the D.C. Circuit, and none addresses *Bell*'s applicability in

the present circumstances. In *de Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), the plaintiff's tort and contract claims did not overlap with the expropriation exception's requirements. The Fifth Circuit's analysis of international law, on which the government relies (at 14), thus did not implicate the concerns underlying *Bell*, and the court did not consider whether *Bell* might apply. *Id.* at 1395-1397. Under *Simon*, 812 F.3d at 140, the D.C. Circuit also would not have applied *Bell*. Likewise, in *Mezerhane* v. *Republica Bolivariana de Venezuela*, 785 F.3d 545, 547 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016), the plaintiff asserted "common law tort claims" that did not fully overlap with the jurisdictional question. And in *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), the plaintiff failed even to plead an element (exhaustion of domestic remedies) that the Seventh Circuit deemed necessary to establish a violation of international law, *see id.* at 679-685—an issue that also would not be subject to *Bell* in the D.C. Circuit. *See Agudas*, 528 F.3d 940 (*Bell* applies where "jurisdiction depends on the plaintiff's asserting a particular type of claim, *and it has made such a claim*" (emphasis added)).

Unlike the cases cited by the government, the only other circuit that has considered what standard applies when a defendant argues on legal grounds that the plaintiff has not placed in issue rights in property taken in violation of international law holds that *Bell* applies. *West* v. *Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987); *see also Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992).

Because the court of appeals' decision creates no circuit conflict, the government's speculation (at 15)

that the decision might undermine the uniformity of FSIA law or "encourage forum-shopping" is baseless. Moreover, by ignoring the differences between the narrow category of cases in which the D.C. Circuit applies *Bell* and other cases in which it does not, the government vastly overstates (at 16) the supposed consequences of the decision below. Indeed, since the D.C. Circuit first addressed *Bell* in the FSIA context in *Agudas*, it has applied it in only one reported decision: this one.

The rarity of FSIA decisions applying *Bell* is not surprising. "Litigants more commonly arrive at the result produced by [a merits-related] Fed. R. Civ. P. 12(b)(1) motion for lack of subject matter jurisdiction by moving early for dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted." *Robinson*, 269 F.3d at 149 n.1 (Sotomayor, J., concurring in the judgment). The issue arose here only because petitioners did not initially challenge the legal sufficiency of respondents' expropriation claims under Rule 12(b)(6) and stipulated to litigate certain legal questions before jurisdictional discovery. This Court should not delay this case further to address an issue that affects such a narrow class of cases and as to which there is no circuit conflict.

B. The D.C. Circuit's Approach Does Not Conflict With This Court's Precedent

Even if mere error in the decision below could justify this Court's review, there is no error here. The government's contrary contention (at 7-13) relies principally on *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007). But the decision below does not conflict with *Permanent Mission* or any other decision of this Court.

In *Permanent Mission*, the City of New York sought a declaration that tax liens it held against properties owned by foreign governments were valid. *Id.* at 196. The City relied on the FSIA's "immovable property" exception, which applies when "rights in immovable property situated in the United States are in issue," 28 U.S.C. §1605(a)(4). In applying that exception, this Court did not cite *Bell* or consider its relevance, and the parties do not appear to have suggested that *Bell* might apply. No. 06-134 Pet. Br., 2007 WL 608160; No. 06-134 Resp. Br., 2007 WL 1033565; *cf. Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (where Court "never squarely addressed the issue," but "at most assumed the applicability" of a particular standard, Court is "free to address the issue on the merits").

The D.C. Circuit also would not have applied *Bell* in *Permanent Mission*. The jurisdictional inquiry there (whether the suit implicated rights in immovable property) did not overlap with the merits (the validity of the tax liens). Whether the buildings were subject to City tax turned on the law of consular relations, not on whether the tax liens constituted "rights in immovable property." *City of New York* v. *Permanent Mission of India to the United Nations*, 618 F.3d 172, 177-178 (2d Cir. 2010). Under *Simon*, 812 F.3d at 140-141, the D.C. Circuit would have decided the jurisdictional issue without applying *Bell*.

In cases like this one, unlike *Permanent Mission*, applying *Bell* preserves the distinction between jurisdictional and merits questions. The government's approach would collapse that distinction and "carr[y] the courts beyond the bounds of authorized judicial action." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Under the government's view, a court would have to make a final determination at the threshold of

an expropriation case whether the defendant had provided "just compensation"—that is, the "prompt[,] adequate[,] and effective compensation required by international law." *Restatement (Third) of Foreign Relations Law* §712 cmt. c (1987). If the court found the compensation was "just," it would have to conclude that there had been no violation of international law and that it had no jurisdiction in the case—but not before interpreting and applying the requirements of "prompt," "adequate," and "effective" compensation, effectively making binding pronouncements of law in circumstances where it had no authority to do so, *Steel Co.*, 523 U.S. at 93-102.

The government attempts to justify this approach (at 12-13) on the tenuous ground that the FSIA contains "substantive federal immunity standards" that are absent in the federal-question jurisdiction statute. But as the D.C. Circuit has explained, the "substantive federal immunity standards" in the expropriation exception require only (1) that certain factual predicates establishing a jurisdictional nexus to the United States are present, and (2) that the plaintiff has "put 'in issue' ... a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff's rights in property ... in violation of international law." *Agudas*, 528 F.3d at 940; *see Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006) (substantive "jurisdiction-conferring provisions" often "describe particular types of claims" over which a court may exercise jurisdiction); *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 496-497 (1983) (FSIA's exceptions generally identify the "*types of actions* for which foreign sovereigns may be held liable" (emphasis added)). That the FSIA requires a suit to implicate a certain type of claim before a court may assume jurisdiction does not support the government's

view that a court must resolve that claim on the merits to determine its own jurisdiction.

II. THE GOVERNMENT IS CORRECT THAT THE OTHER QUESTIONS PRESENTED DO NOT WARRANT REVIEW

The government is correct (at 6) that this Court should deny review of the principal questions presented. As the government explains, certiorari is not warranted on either issue, regardless whether the Court decides to review the *Bell* issue. U.S. Br. 6-7, 20-21, 23.

A. H&P-V's Claim Does Not Merit Review

Until this case, only the Second Circuit had considered the rare circumstance in which a foreign state expropriates a domestically incorporated corporation based on discriminatory animus due to the corporation's American shareholders. That court twice concluded that Cuba's expropriation of a U.S.-owned company incorporated in Cuba violated international law. *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 185 (2d Cir. 1967). Like this case, Cuba treated the domestic corporation "in a particular way because of the nationality of its shareholders" and could not rely on "the 'nationality' of the corporate fiction" to evade the international-law prohibition against discriminatory and uncompensated takings. *Sabbatino*, 307 F.2d at 861; *Farr*, 383 F.2d at 185. As the government agrees (at 20, 21), the D.C. Circuit's decision following *Sabbatino* and *Farr* "d[oes] not create any ... split" and "lacks significance beyond this case." *See* Opp. 11-18.

The D.C. Circuit's decision is consistent with international law as reflected in the Second and Third Restatements. Both acknowledge—as does the govern-

ment (at 9 n.3)—that discriminatory takings violate international law, and both cite *Sabbatino* and *Farr* as paradigmatic examples. *See Restatement (Second) of Foreign Relations Law*, §171 cmt. d, illus. 3 (1965); *Restatement (Third) of Foreign Relations Law* §712 reporter's note 5; Opp. 13-14.

The decision also aligns with *Barcelona Traction, Light & Power (Belgium* v. *Spain)*, 1970 I.C.J. 3 (Feb. 5). Contrary to the government's characterization (at 19), *Barcelona Traction* does not hold that a corporation must "be treated as a national of its state of incorporation" for all purposes, even where—as here—that state has deemed the corporation "foreign" for "all relevant legal effects" and targeted it for expropriation based on the foreign nationality of its shareholders. Opp. 2, 4-6, 30-31.[2] The ICJ held only that the state of a corporation's shareholders does not have a superior right to assert diplomatic protection on behalf of a corporation when the corporation's state of incorporation has already asserted diplomatic protection based on "a close and permanent connection." 1970 I.C.J. at 42 ¶71; *see* Opp. 15-16. The ICJ left open the possibility that diplomatic protection by another state with significant links—including the state of a parent corporation or its shareholders—could be appropriate in an action against the state of incorporation. 1970 I.C.J. at 48 ¶¶92-93; *see also Restatement (Third)of Foreign Relations Law* §213 reporters' note 3.

---

[2] Venezuela's treatment of H&P-V as a "FOREIGN COMPANY" provides an alternative ground for the decision below that the court of appeals did not address. Opp. 30-31. This independent ground—and the other jurisdictional defenses that remain unresolved (Opp. 29-30)—render this case a poor vehicle even if the issues warranted review.

B. H&P-IDC's Claim Does Not Warrant Review

As the government agrees (at 22-23), municipal law often "accords shareholders 'direct rights' related to [a] corporation that are independent of the rights of the corporation" itself, and the taking of the corporation's property can "implicate [the] shareholder's direct rights." U.S. Br. 22-23; *see Barcelona Traction*, 1970 I.C.J. at 34, 36 ¶¶41, 47 ("[m]unicipal law determines the legal situation ... of those persons who hold shares in [corporate entities]," and "[w]henever one of his direct rights is infringed, the shareholder has an independent right of action").

Here, both U.S. and Venezuelan law conferred relevant direct rights on H&P-IDC. *See* Opp. 19; *Fletcher Cyclopedia of the Law of Corporations* §§2949.21, 2949.40 (2013 rev. ed.); Vz. Commercial Code, art. 280(4) (Opp. App. 1a-2a). The D.C. Circuit accordingly held that as the sole shareholder of a business that was taken in its entirety, H&P-IDC placed its direct "rights in property ... in issue" in this case. Pet. App. 17a-22a.

The government quibbles (at 22-23) with the standard of review the court applied in making that determination, but it does not claim the court reached the wrong conclusion. That conclusion would be correct under any standard. Petitioners do not contend that the court of appeals' holding creates a circuit conflict, arises frequently, or holds any significance beyond this case. Opp. 18. As the government concludes (at 23), this question "does not warrant review."

CONCLUSION

The petition should be denied.

Respectfully submitted.

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
BLAKE C. ROBERTS
MOLLY M. JENNINGS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
david.ogden@wilmerhale.com

JUNE 2016

Supreme Court, U.S.
FILED
AUG 26 2016
OFFICE OF THE CLERK

No. 15-423

In the Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA, ET AL.,
PETITIONERS

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
SHARON SWINGLE
LEWIS S. YELIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

BRIAN J. EGAN
Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that a foreign state and its instrumentalities are immune from suit in United States courts, subject to limited statutory exceptions. The expropriation exception provides that a foreign state is not immune "in any case * * * in which rights in property taken in violation of international law are in issue" and there is a specified commercial-activity nexus to the United States. 28 U.S.C. 1605(a)(3).

The question presented is whether a district court lacks jurisdiction under Section 1330(a) and Section 1605(a)(3) on the ground that a plaintiff in an action against a foreign state has failed to make legally sufficient allegations of "rights in property" or a "tak[ing] in violation of international law" only when the plaintiff's claim that "rights in property taken in violation of international law are in issue" is frivolous or completely devoid of merit.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 7
Argument:
A. A foreign state is immune from state or federal court jurisdiction in a suit brought pursuant to the expropriation exception unless the plaintiff's allegations are legally sufficient to satisfy the exception's substantive requirements 9
B. The court of appeals erred in ruling that jurisdiction was proper so long as respondents' allegations that the substantive standards of the expropriation exception were satisfied were not "wholly insubstantial or frivolous" 23
C. The judgment should be vacated and the case remanded for further consideration under the correct legal standard 32
Conclusion 34
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Abelesz v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012) 23
Agudas Chasidei Chabad of U.S. v. *Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008) 5, 6, 23, 25, 28, 29
American Nat'l Red Cross v. *S.G.*, 505 U.S. 247 (1992) 23
Arbaugh v. *Y & H Corp.*, 546 U.S. 500 (2006) 27, 29, 30
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 11, 15, 18

Cases—Continued: Page

Asociacion de Reclamantes v. *United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985) 17
Banco Nacional de Cuba v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), rev'd on other grounds by 376 U.S. 398 (1964) 6
Bell v. *Hood*, 327 U.S. 678 (1946) ..... *passim*
Boos v. *Barry*, 485 U.S. 312 (1988) 22
Cary v. *Curtis*, 44 U.S. (3 How.) 236 (1845) 15
Case Concerning the Barcelona Traction, Light & Power Co. (Belgium v. *Spain)*, 1970 I.C.J. 3, (Feb. 5) 33
de Sanchez v. *Banco Cent. de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985) 17, 23, 33
Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 19, 33
EM Ltd. v. *Republic of Argentina*, 473 F.3d 463 (2d Cir.), cert. denied, 552 U.S. 818 (2007) 19
Fair v. *Kohler Die & Specialty Co.*, 228 U.S. 22 (1913) 26
Foremost-McKesson, Inc. v. *Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) 19
Franchise Tax Bd. v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) 15
Garb v. *Republic of Poland*, 440 F.3d 579 (2d Cir. 2006) 21
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 19
Hertz Corp. v. *Friend*, 559 U.S. 77 (2010) 30
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) 22
Merrill Lynch v. *Manning*, 136 S. Ct. 1562 (2016) 24, 26, 27, 29

Cases—Continued: Page

Mezerhane v. *República Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015), cert. denied, 136 S. Ct. 800 (2016) 23
Mims v. *Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012) 24
Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. *Elahi*, 556 U.S. 366 (2009) 16
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 19
Moran v. *Kingdom of Saudi Arabia*, 27 F.3d 169 (5th Cir. 1994) 19, 20, 31
Mt. Healthy City Sch. Dist. Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977) 18
National City Bank v. *Republic of China*, 348 U.S. 356 (1955) 20, 21
OBB Personenverkehr AG v. *Sachs*, 136 S. Ct. 390 (2015) 18, 31
Oliver Am. Trading Co. v. *Mexico*, 264 U.S. 440 (1924) 12
Owens v. *Republic of Sudan*, No. 01-2244, 2016 WL 1170919 (D.D.C. Mar. 23, 2016) 26
Permanent Mission of India to the U.N. v. *City of N.Y.*, 551 U.S. 193 (2007) 8, 10, 18, 20, 33
Persinger v. *Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984) 22
Phoenix Consulting, Inc. v. *Republic of Angola*, 216 F.3d 36 (D.C. Cir. 2000) 14
Rein v. *Socialist People's Libyan Arab Jamahirya*, 162 F.3d 748 (2d Cir. 1998), cert. denied, 527 U.S. 1003 (1999) 20
Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 10, 11, 12

Cases—Continued: Page

Republic of Mexico v. *Hoffman*, 324 U.S. 30 (1945) 10, 12, 20
Republic of Peru, Ex Parte, 318 U.S. 578 (1943) 10, 12, 21
Republic of Philippines v. *Pimentel*, 553 U.S. 851 (2008) 19, 20
Robinson v. *Government of Malaysia*, 269 F.3d 133 (2d Cir. 2001) 31
Samantar v. *Yousuf*, 560 U.S. 305 (2010) 10
Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 11, 18, 30
Schooner Exch. v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812) 9
Segni v. *Commercial Office of Spain*, 816 F.2d 344 (7th Cir. 1987) 20
Siderman de Blake v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993) 23
Simon v. *Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) 25, 26, 28, 30
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 26
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 25
Swafford v. *Templeton*, 185 U.S. 487 (1902) 24
United States v. *Congress Constr. Co.*, 222 U.S. 199 (1911) 15
United States v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) 21
Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) ..... *passim*
Zappia Middle East Constr. Co. v. *Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000) 21, 23

Case—Continued: Page

Zschernig v. *Miller*, 389 U.S. 429 (1968) 21

Constitution, statutes and rules: Page

U.S. Const. Art. I 12

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.* 1

28 U.S.C. 1330(a) 2, 8, 11, 12, 15, 30

28 U.S.C. 1330(b)-(c) 11

28 U.S.C. 1331 ..... 13, 23, 24

28 U.S.C. 1343 18

28 U.S.C. 1441(d) 30

28 U.S.C. 1602 ..... 8, 10, 15

28 U.S.C. 1604 ..... 2, 11, 28

28 U.S.C. 1605 ..... 18, 29

28 U.S.C. 1605-1607 ..... 2, 11

28 U.S.C. 1605(a)(2) 4, 18

28 U.S.C. 1605(a)(3) ..... *passim*

28 U.S.C. 1605(a)(4) 8, 18

28 U.S.C. 1605(a)(5) 26

28 U.S.C. 1605(a)(5)(B) 29

28 U.S.C. 1605A 26

15 U.S.C 78aa(a) 27

15 U.S.C. 8405 29

28 U.S.C. 41(1) (1940) 24

Fed. R. Civ. P.:

Rule 12(b)(1) 7, 14, 18, 29, 30, 31

Rule 12(b)(6) 31

Miscellaneous:

Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* (2d ed. 2003) 20

Miscellaneous—Continued: Page

Dep't of Justice, *Office of Foreign Litigation*, https://www.justice.gov/civil/office-foreign-litigation 21

Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995) 15

H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 10, 11, 16, 21

13D Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. Supp. 2016) 14

In the Supreme Court of the United States

No. 15-423

BOLIVARIAN REPUBLIC OF VENEZUELA, ET AL.,
PETITIONERS

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the appropriate standard for establishing jurisdiction in an action against a foreign state under the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. 1330, 1441(d), 1602 *et seq.* Because application of the FSIA's jurisdictional provisions has implications for the treatment of the United States in foreign courts and for its relations with other sovereigns, the United States has a substantial interest in this case. At the Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of this case.

STATEMENT

1. The FSIA establishes "a comprehensive set of legal standards governing claims of immunity in every

civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA provides that a foreign state and its agencies and instrumentalities "shall be immune from the jurisdiction" of federal and state courts except as provided by certain international agreements and by exceptions enumerated in the statute. 28 U.S.C. 1604; see 28 U.S.C. 1605-1607. It also provides that federal district courts shall have jurisdiction "of any nonjury civil action * * * as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. 1330(a).

The exception to immunity involved in this case, which is set forth in Section 1605(a)(3), is known as the expropriation exception. It provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which rights in property taken in violation of international law are in issue" and there is a specified commercial-activity nexus to the United States. 28 U.S.C. 1605(a)(3). The nexus requirement is that the property taken or "any property exchanged for such property" must be (1) "present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or (2) "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Ibid.*

2. a. In the mid-1970s, petitioner Bolivarian Republic of Venezuela (Venezuela) nationalized its oil in-

dustry. Pet. App. 4a. As a result, Venezuela controls production and exportation of oil through two state-owned corporations, petitioners Petróleos de Venezuela, S.A., and PDVSA Petróleo (collectively PDVSA). *Ibid.*

For many decades, respondent Helmerich & Payne International Drilling Company (H&P-IDC), a United States company, provided oil-drilling services to petitioners through a wholly owned subsidiary, most recently respondent Helmerich & Payne de Venezuela, C.A. (H&P-V). H&P-V is incorporated under Venezuelan law. Pet. App. 3a-4a, 39a.

In 2007, H&P-V entered into contracts with PDVSA to provide drilling services for a fixed period using highly specialized drilling rigs, which H&P-IDC purchased and then transferred to H&P-V. Pet. App. 4a. By 2009, petitioners had failed to pay approximately $100 million owed to H&P-V for its drilling services. H&P-V responded by fulfilling its existing contractual obligations, announcing that it would not renew the contracts until it was paid, and disassembling its drilling rigs. *Id.* at 4a-5a.

In June 2010, petitioners blockaded H&P-V's properties where the disassembled rigs were located. Pet. App. 5a; see *id.* at 5a-6a. Shortly thereafter, the Venezuelan National Assembly enacted a measure recommending that then-President Hugo Chavez expropriate H&P-V's property, and he issued an expropriation decree the same day. *Id.* at 6a, 44a. Petitioners "now use[] H&P-V's rigs and other assets in [their] state-owned drilling business." *Id.* at 8a.

b. Respondents filed suit in the District Court for the District of Columbia, claiming that (1) PDVSA and Venezuela took respondents' property in violation of

international law, and (2) PDVSA breached the drilling contracts with H&P-V. Pet. App. 45a-46a; see J.A. 103-104; see also J.A. 84 (alleging that respondents were "subjected to discriminatory treatment" because of their association with the United States). As to the first count, respondents asserted that the court had jurisdiction over the claim under 28 U.S.C. 1605(a)(3).[1] Pet. App. 8a.

As relevant here, petitioners moved to dismiss respondents' expropriation claims on the ground that they did not fall within the scope of the exception to immunity in Section 1605(a)(3). Pet. App. 8a. The parties agreed to brief certain threshold issues, including whether "H&P-V is a national of Venezuela under international law" and whether "H&P-IDC has standing to assert a taking in violation of international law" based on Venezuela's expropriation of H&P-V's property. *Id.* at 9a; see J.A. 119 (order stating that resolution of those issues would "assum[e] the truth" of the complaint's factual allegations).

The district court granted the motion to dismiss in part and denied it in part. The court dismissed H&P-V's expropriation claim because it determined that H&P-V is a national of Venezuela. Pet. App. 49a-59a, 91a; see *id.* at 12a ("[G]enerally, a foreign sovereign's expropriation of its own national's property does not violate international law."); *id.* at 93a-94a. But the court declined to dismiss H&P-IDC's expropriation

---

[1] Respondents' contract claims are the subject of a certiorari petition pending before this Court (No. 15-698) involving the separate commercial-activity exception to immunity in 28 U.S.C. 1605(a)(2). The United States filed an amicus brief in that matter, at this Court's invitation, expressing the view that the Court should deny the petition.

claim, reasoning that although H&P-IDC did not own the property petitioners allegedly seized from H&P-V, H&P-IDC asserted that petitioners effectively took its interest in H&P-V as a going concern. *Id.* at 81a-90a.

3. The court of appeals affirmed the district court's expropriation-related rulings in part and reversed in part. Pet. App. 1a-29a.

a. The court of appeals first addressed the standard for determining whether respondents' "takings claim[s]" fell within the scope of the expropriation exception. Pet. App. 10a-12a. The court rejected the contention that the claims should be dismissed because they did not, as a legal matter, sufficiently allege "rights in property taken in violation of international law" under Section 1605(a)(3). 28 U.S.C. 1605(a)(3); Pet. App. 11a. Relying on *Bell* v. *Hood*, 327 U.S. 678 (1946), and D.C. Circuit precedent relying on *Bell*, the court stated that subject-matter jurisdiction "is not defeated" by the possibility that a complaint "might fail to state a cause of action on which petitioners could actually recover." Pet. App. 11a (citation omitted); see *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 940-941 (D.C. Cir. 2008). The court concluded instead that it "will grant a motion to dismiss" for lack of jurisdiction under the FSIA "on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property . . . in issue' *only* if the claims are 'wholly insubstantial or frivolous'"—a standard that the court described as setting an "exceptionally low bar." Pet. App. 11a (quoting *Chabad*, 528 F.3d at 943, 946).

The court of appeals next held that H&P-V had "asserted a non-frivolous international expropriation claim."

Pet. App. 12a; see *id.* at 13a-17a. The court acknowledged that, under the so-called domestic-takings rule, a foreign state's expropriation of its own national's property does not violate international law. *Id.* at 12a. But the court understood a pre-FSIA Second Circuit decision, *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 861 (1962), rev'd on other grounds by 376 U.S. 398 (1964), to hold that international law prohibits a state from expropriating the property of a domestic corporation based on discrimination against the corporation's foreign shareholders. Pet. App. 13a-14a. In light of *Sabbatino*, and in the absence of "any decision from any circuit that so completely forecloses H&P-V's discriminatory takings theory as to *inescapably* render the claim[] frivolous and *completely* devoid of merit," the court held that H&P-V's claim "has satisfied this Circuit's forgiving standard." *Id.* at 16a (citation and internal quotation marks omitted).

The court of appeals likewise held that H&P-IDC's claim that its own "rights in property" had been taken in violation of international law was not frivolous. Pet. App. 17a-22a. The court noted that "shareholders may have rights in corporate property" that are not derivative of the corporation's rights, *id.* at 20a, and that H&P-IDC alleged that it had suffered "a total loss of control over its subsidiary," *id.* at 22a. Accordingly, without resolving the legal question of whether H&P-IDC had viably alleged "rights in property" under Section 1605(a)(3), the court ruled that "H&P-IDC has 'put its rights in property in issue in a non-frivolous way.'" *Ibid.* (quoting *Chabad*, 528 F.3d at 941).

b. Judge Sentelle dissented in part. Pet. App. 30a-36a. He would have held that both H&P-V and H&P-

IDC had "failed to plead a taking in *violation of international law*." *Id.* at 34a (citation omitted); see *id.* at 32a-33a ("To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate Venezuela's sovereignty, the value protected by the FSIA.").

SUMMARY OF ARGUMENT

Section 1605(a)(3) of the Foreign Sovereign Immunities Act creates a narrow exception to foreign sovereign immunity in certain cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. 1605(a)(3). Like the FSIA's other exceptions to immunity, the expropriation exception "codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). And "whether statutory subject-matter jurisdiction exists under the [FSIA] entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies." *Id.* at 497-498. The court of appeals erred in holding that merely non-frivolous allegations regarding the substantive requirements of an immunity exception were sufficient to establish jurisdiction—a standard that the court itself described as "exceptionally low." Pet. App. 11a.

For a case to come within the scope of Section 1605(a)(3), the complaint must assert a claim that is legally sufficient to satisfy the provision's substantive requirements. When the foreign state challenges the legal sufficiency of the complaint's jurisdictional allegations under Federal Rule of Civil Procedure 12(b)(1), the district court must determine whether the plaintiff's allegations, if true, actually describe a "tak[ing]

in violation of international law"—that is, conduct that is prohibited by international expropriation law—and identify "rights in property" that were impaired as a result of the foreign state's conduct. If those substantive requirements are not satisfied, the foreign state is immune from suit both federal and state courts, the district court lacks subject-matter jurisdiction, and the claim must be dismissed.

That conclusion is dictated by the FSIA's text and purposes, as well as by this Court's precedent. The FSIA calls for courts to decide a foreign state's "entitle[ment]" to immunity, not to hypothesize about what the outcome of that analysis could conceivably be. 28 U.S.C. 1330(a); see 28 U.S.C. 1602. Section 1605(a)(3) requires that "rights in property taken in violation of international law are in issue"—not that such rights may be in issue, or that there may have been a taking that international law might proscribe. 28 U.S.C. 1605(a)(3). And requiring a legal determination of immunity at the "threshold" of the action, *Verlinden*, 461 U.S. at 493-494, is necessary to ensure that the foreign state actually receives the protections of immunity if no exception applies, to preserve the dignity of the foreign state and comity between nations, and to safeguard the interests of the United States when it is sued in foreign courts. This Court has made just such an analysis of legal sufficiency when considering the application of other FSIA exceptions, including the exception for cases "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4); see *Permanent Mission of India to the U.N.* v. *City of N.Y.*, 551 U.S. 193, 198-199 (2007).

In holding otherwise, the court of appeals relied only on this Court's decision in *Bell* v. *Hood*, 327 U.S. 678 (1946), which construed the "aris[ing] under" requirement in the federal-question jurisdictional statute. But the *Bell* standard, which is derived from a statute that does "nothing more than grant jurisdiction over a particular class of cases," *Verlinden*, 461 U.S. at 496-497, has no application in the FSIA context, where Congress—impelled by foreign relations concerns that are specific to suits against foreign sovereigns—made foreign states presumptively immune and imposed substantive preconditions to the existence of jurisdiction that must be satisfied in every case.

The court of appeals failed to assess whether respondents' allegations were legally sufficient to establish that petitioners' alleged actions violated international law or that H&P-IDC's own rights in property were in issue. Accordingly, the judgment should be vacated and the case remanded for further consideration under the proper standard.

ARGUMENT

A. A Foreign State Is Immune From State Or Federal Court Jurisdiction In A Suit Brought Pursuant To The Expropriation Exception Unless The Plaintiff's Allegations Are Legally Sufficient To Satisfy The Exception's Substantive Requirements

1. The United States has long recognized that foreign sovereigns are generally immune from suit in our courts. See *Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (explaining that sovereign immunity rests on the "perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse"); see also

Samantar v. *Yousuf*, 560 U.S. 305, 311 (2010). For much of the Nation's history, the United States adhered to the "absolute" theory of foreign sovereign immunity, under which foreign states were not subject to suit without their consent. See, *e.g.*, *Verlinden*, 461 U.S. at 486-487; *Permanent Mission*, 551 U.S. at 199.

The courts historically looked to "the political branch of the government charged with the conduct of foreign affairs" to decide whether absolute immunity should be recognized in a particular case. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945); see *Verlinden*, 461 U.S. at 486; *Ex parte Republic of Peru*, 318 U.S. 578, 588-589 (1943). In 1952, the Department of State adopted the "restrictive" theory of foreign sovereign immunity, under which a foreign state generally was immune from suit for sovereign or public acts but not for commercial acts. See *Verlinden*, 461 U.S. at 486-487.

In 1976, Congress enacted the FSIA, which establishes comprehensive "legal standards" governing claims of immunity in all civil actions against foreign states. *Verlinden*, 461 U.S. at 488. "For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Ibid.*; see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976) (*House Report*). The Act also "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004); see 28 U.S.C. 1602.

The FSIA sets forth a general rule that a foreign state "shall be immune" from suit in federal and state courts unless the suit comes within one of the FSIA's specific exceptions to that rule (or an exception is

provided by an applicable international agreement). 28 U.S.C. 1604; see 28 U.S.C. 1605-1607; *Altmann*, 541 U.S. at 691; see also *House Report* 17 (FSIA "starts from a premise of immunity"). The exception invoked in this case provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which rights in property taken in violation of international law are in issue" and a specified commercial-activity nexus with the United States is present. 28 U.S.C. 1605(a)(3).

The FSIA also provides that when the requirements of one (or more) of the immunity exceptions are met, and a foreign state is therefore not immune from suit, 28 U.S.C. 1604, federal district courts shall have subject-matter jurisdiction over the relevant claims. 28 U.S.C. 1330(a) (conferring jurisdiction "of any nonjury civil action * * * as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement"). Accordingly, "subject-matter jurisdiction" in any action against a foreign state "depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden*, 461 U.S. at 493; see *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993) (same); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (same); see also 28 U.S.C. 1330(b)-(c) (when district court has subject-matter jurisdiction and service is proper, then "[p]ersonal jurisdiction over a foreign state shall exist").

2. As this Court held in *Verlinden*, the FSIA sets forth "substantive" standards of federal law governing

the sovereign immunity of a foreign state, and Section 1330(a)'s grant of subject-matter jurisdiction therefore also incorporates those substantive requirements. 461 U.S. at 493, 497; see *Altmann*, 541 U.S. at 694-696; see also *Hoffman*, 324 U.S. at 36 (sovereign immunity is "accepted rule of substantive law"); *Ex parte Peru*, 318 U.S. at 588 (sovereign immunity is "overriding principle of substantive law"); *Oliver Am. Trading Co.* v. *Mexico*, 264 U.S. 440, 442-443 (1924).

In *Verlinden*, the Court considered "whether Congress exceeded the scope of Art. III of the Constitution by granting federal courts subject-matter jurisdiction over certain civil actions * * * against foreign sovereigns" that fall outside the bounds of diversity jurisdiction. 461 U.S. at 491. Interpreting the FSIA in light of its text, context, and purposes, the Court held that "a suit against a foreign state under th[e] [FSIA] necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III." *Id.* at 493; see *id.* at 492. That is so, the Court explained, because the FSIA's rule of immunity and its exceptions to that immunity are an exercise of Congress's "undisputed power" under Article I "to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States"—a decision that "raise[s] sensitive issues concerning the foreign relations of the United States" and as to which the "primacy of federal concerns is evident." *Id.* at 493; see *ibid.* (noting Congress's "authority over foreign commerce and foreign relations"). It was to "promote these federal interests" that Congress chose to "enact[] a statute comprehensively regulating the amena-

bility of foreign nations to suit" in federal or state court under "detailed federal law standards." *Id.* at 493-494.

In so ruling, the Court in *Verlinden* rejected several arguments that the FSIA's immunity-related provisions have a limited, non-substantive reach. As an initial matter, the Court explained that Congress's power to enact the relevant provisions was not constrained by the various limitations that have been imposed in interpreting 28 U.S.C. 1331, "which grants district courts general federal-question jurisdiction over any case that 'arises under' the laws of the United States." *Verlinden*, 461 U.S. at 494; see *id.* at 495 ("the Court of Appeals' heavy reliance on decisions construing [Section 1331] was misplaced").

The Court also rejected the contention that the FSIA is merely "a jurisdictional statute" and therefore "can never constitute the federal law under which the action arises, for Art. III purposes." *Verlinden*, 461 U.S. at 496. The Court contrasted statutes that seek "to do nothing more than grant jurisdiction over a particular class of cases" with the FSIA, which "does not merely concern access to the federal courts" but rather is a "comprehensive scheme" substantively regulating "foreign commerce" and foreign relations. *Id.* at 496-497; see *ibid.* (noting that the FSIA "governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, *federal or state*") (emphasis added); *id.* at 495 n.22. The Court concluded that because "[t]he [FSIA] codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law," and "applying those standards will generally require interpretation of numerous points of federal law," the

fact that "the inquiry into foreign sovereign immunity" is "labeled" a matter of subject-matter jurisdiction "does not affect the constitutionality" of the statute. *Id.* at 497.

3. The Court further explained in *Verlinden* that the substantive question of immunity is one that must be resolved at the outset of a case. "At the threshold of every action in a district court against a foreign state, * * * the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." 461 U.S. at 493-494; see *id.* at 497-498 ("whether statutory subject-matter jurisdiction exists under the [FSIA] entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies"). It necessarily follows that when a foreign state moves to dismiss a complaint for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) on the ground that the claim as pleaded does not meet the substantive requirements of the relevant exception to immunity, the district court must determine whether the allegations are legally sufficient to satisfy those requirements.[2] If not, the court must dismiss the case.

a. The text of the relevant FSIA provisions dictates that conclusion. Assessing whether a claim falls

---

[2] When the foreign state challenges the factual basis for jurisdiction, the court must go beyond the pleadings and resolve disputed issues of fact necessary to determine subject-matter jurisdiction. See *Phoenix Consulting, Inc.* v. *Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); see generally 13D Charles Alan Wright et al., *Federal Practice and Procedure* § 3564, at 93 n.7 (3d ed. Supp. 2016). In this Court, this case involves a legal, not factual, challenge to jurisdiction.

within a particular statutory grant of jurisdiction is, after all, a question of statutory construction, see *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 21-22 (1983), and "the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good,'" *Amerada Hess*, 488 U.S. at 433-434 (quoting *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

In Section 1330(a), Congress provided that a district court has subject-matter jurisdiction over an action against a foreign state only if "the foreign state is not entitled to immunity either under sections 1605-1607 of [Title 28] or under any applicable international agreement." 28 U.S.C. 1330(a). And in Section 1602, which defines the purposes of the FSIA, Congress provided that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States * * * in conformity with the principles set forth in this chapter." 28 U.S.C. 1602. Those provisions establish that a federal court lacks the power to proceed until it has actually "decided" that the foreign state is not legally "entitled to immunity." 28 U.S.C. 1330(a), 1602. Hypothesizing about what the outcome of such a substantive determination might ultimately be is not sufficient.

In order for a foreign state to lack immunity under the FSIA exception invoked in this case, the suit must be one "in which rights in property taken in violation of international law are in issue." 28 U.S.C 1605(a)(3). The term "in issue" means under discussion or in dispute. See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 470 (2d ed. 1995); see also *United*

States v. *Congress Constr. Co.*, 222 U.S. 199, 200-201 (1911); cf. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 556 U.S. 366, 379-384 (2009) (interpreting statutory term "at issue" similarly). And Section 1605(a)(3) defines what must be in dispute in the case for the exception to apply: actual "rights in property taken in violation of international law." In other words, the allegations in the complaint must be legally sufficient to identify property rights that serve as the basis for the plaintiff's claim, as well as to establish that a "tak[ing] in violation of international law" has indeed taken place, in order for a district court to have the power to resolve a dispute stemming from such an alleged taking.

A court cannot "satisfy itself" that a claim comes within its jurisdiction, *Verlinden*, 461 U.S. at 494, unless it determines the scope of the substantive requirements in Section 1605(a)(3) and decides that the plaintiff's allegations fulfill them. Section 1605(a)(3) thus cannot be read to obviate a foreign state's immunity when "rights in property taken in violation of international law" *may be* "in issue"—when, for example, there is an unresolved dispute about whether a taking of property (as alleged) violated international law or simply the foreign state's own law. A dispute encompassed by Section 1605(a)(3) is one in which the plaintiff's allegations, if true, are sufficient as a matter of law to establish that a taking in violation of international law has occurred and that the plaintiff has rights in the relevant property, and the plaintiff seeks some form of relief on the ground that those rights have not been vindicated. See *House Report* 19-20 ("[t]he term 'taken in violation of international law' would include the nationalization or expropriation

of property without payment of the prompt adequate and effective compensation required by international law," and "takings which are arbitrary or discriminatory in nature").

Congress's decision to limit the exercise of jurisdiction over a foreign sovereign under Section 1605(a)(3) to cases in which "rights in property taken in violation of international law are in issue" no doubt stems from the very nature of the substantive restriction that the exception embodies. Governmental decisions involving property—particularly real property—within a sovereign's own territorial jurisdiction are generally reserved to that sovereign free of interference by the courts of another nation. See, *e.g.*, *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1520-1524 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 470 U.S. 1051 (1985). In enacting Section 1605(a)(3), Congress decided that foreign states would be subject to suit in U.S. courts in only a narrow class of cases—ones in which "international law" has been "violat[ed]" by such an action and a commercial-activity nexus to the United States is present. Without those limitations, the case would raise what would otherwise be purely a question of the domestic law of the nation where the property is located or would lack a sufficient connection to the United States to justify the exercise of jurisdiction over a foreign state. See, *e.g.*, *de Sanchez* v. *Banco Cent. de Nicaragua*, 770 F.2d 1385, 1395-1398 (5th Cir. 1985). And to ascertain whether such a dispute is before the court, the legal adequacy of the plaintiff's allegations must be assessed before the case moves forward.

Evaluating a complaint's legal adequacy in that way is precisely the approach that this Court has

already taken with respect to a closely analogous subsection of Section 1605: Section 1605(a)(4), which creates an exception to immunity for suits "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). In *Permanent Mission*, *supra*, the Court determined whether, as a matter of law, the plaintiff's claim to enforce a tax lien under New York law fell within Section 1605(a)(4). The Court first determined the scope of Section 1605(a)(4)'s reference to "rights in * * * property," concluding that it extended to non-ownership and non-possessory interests. 551 U.S. at 198-199. The Court then analyzed the content of the lien right asserted under New York law, concluding that the tax lien encumbered the right to convey the relevant property. See *ibid.* The Court accordingly held that the lien-enforcement suit "implicate[d] 'rights in immovable property'" in the United States within the meaning of the FSIA exception. *Id.* at 199. The Court thus determined that the claim pleaded in the complaint was legally sufficient to fulfill Section 1605(a)(4)'s requirements.[3]

---

[3] The Court has given similar treatment to other immunity exceptions. See *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 395-398 (2015) (conclusively resolving at Rule 12(b)(1) stage whether action for personal injury was "based upon a commercial activity" under Section 1605(a)(2)); *Nelson*, 507 U.S. at 351 (same); *Amerada Hess*, 488 U.S. at 439-443 (conclusively deciding at Rule 12(b)(1) stage that "none" of the FSIA's immunity exceptions "apply to the facts of this case"). Outside the sovereign-immunity context, certain other jurisdictional provisions have been held to call for a definitive legal assessment of substantive requirements at the threshold of the case. See, *e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278-279 (1977) (explaining that 28 U.S.C. 1343, which grants federal courts jurisdiction over

b. Ensuring that an action does not proceed past the "threshold," *Verlinden*, 461 U.S. at 493-494, unless the allegations of the complaint are legally sufficient to satisfy the requirements of an exception to immunity is critical to carrying out the purposes of the FSIA.

First, the FSIA is intended to confer immunity from *suit*, not merely liability. Making a legal determination at the outset of the case about whether immunity is applicable is the only way to ensure that a foreign state can realize that important protection. It is the very nature of immunity to protect[] against "the costs, in time and expense, and other disruptions attendant to litigation." *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir.) (citation omitted), cert. denied, 552 U.S. 818 (2007); see *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 865 (2008) (immunity is designed to "give foreign states and their instrumentalities some protection from the inconvenience of suit") (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)); *Moran* v. *Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994) ("[S]overeign immunity under the FSIA is immunity from suit, not just from liability."); cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity protects government officials from "the costs of trial or * * * the burdens of broad-reaching discovery") (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982)). Making jurisdiction a negligible requirement would "frustrate the significance and benefit of entitlement to immunity" by imposing the very burdens and costs that immunity is intended to shield against. *Fore-*

---

actions brought to redress deprivation of federal rights under color of state law, requires inquiry into "whether a statutory action had in fact been alleged").

most-McKesson, Inc. v. *Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990) (citation omitted); see *ibid.* ("Where, as with foreign sovereigns, immunity involves protection from suit, not merely a defense to liability, more than the usual is required of trial courts in making pretrial * * * legal determinations."); *Segni* v. *Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987). For those reasons, appellate courts have consistently concluded that the denial of a Rule 12(b)(1) motion asserting sovereign immunity may be appealed immediately. See *Permanent Mission*, 551 U.S. at 197; *Moran*, 27 F.3d at 172; *Rein* v. *Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 755-756 (2d Cir. 1998), cert. denied, 527 U.S. 1003 (1999); Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations*, at 694-700 (2d ed. 2003) (collecting authorities).

Second, the FSIA's general rule of presumptive immunity, and the limited exceptions thereto, are intended to preserve the dignity of foreign sovereigns and to ensure comity between nations. See, *e.g.*, *Pimentel*, 553 U.S. at 865-866; *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity derives from concerns that include "respect for the 'power and dignity' of the foreign sovereign"). Subjecting a foreign sovereign to the jurisdiction of a U.S. court without first making the substantive legal determination that the FSIA's immunity exceptions dictate may well be understood as "an affront to [that sovereign's] dignity." *Hoffman*, 324 U.S. at 35-36. It also may well damage relations with that sovereign. See *id.* at 35 ("Every judicial action exercising or relinquishing jurisdiction over * * * a foreign government" may "effect * * * our relations with that

government."); *Ex parte Peru*, 318 U.S. at 588-589; see also generally *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968) (assertions of state authority in matters of international importance have "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems"). In the "vast external realm, with its important, complicated, delicate and manifold problems," *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936), perceived affronts to foreign states may result over the long term in reduced cooperation in a variety of areas. That is the opposite of what the FSIA was intended to accomplish. See *House Report* 26-27 (expressing intent to "ease the conduct of foreign relations by the United States"); *id.* at 11, 32, 45; see also *Zappia Middle East Constr. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 250-252 (2d Cir. 2000).

Finally, and relatedly, ensuring that a substantive threshold determination is made about whether a plaintiff's allegations satisfy one of the statute's exceptions to immunity serves the "reciprocal self-interest" of the United States—another one of the FSIA's purposes. *National City Bank*, 348 U.S. at 362; see *House Report* 9; *Garb* v. *Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006). The United States engages in extensive activities overseas in support of its worldwide diplomatic, security, and law enforcement missions, and it is not infrequently sued in foreign courts. See generally Dep't of Justice, *Office of Foreign Litigation* (OFL), https://www.justice.gov/civil/office-foreign-litigation ("At any given time, foreign lawyers under OFL's direct supervision represent the United States in approximately 1,000 lawsuits pending

in the courts of over 100 countries."). Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), a full substantive determination about a foreign sovereign's immunity under the FSIA must be made at the outset of the case—lest suits against the United States abroad be permitted to proceed past their initial stages, thus embroiling the United States in expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated. Cf. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing statute to avoid "invit[ing] retaliatory action from other nations"); *Persinger*, 729 F.2d at 841 (declining to adopt construction of FSIA that bore the "potential for international discord and for foreign government retaliation"); cf. also *Boos* v. *Barry*, 485 U.S. 312, 323 (1988) (highlighting importance of "concept of reciprocity" in international law and diplomacy and explaining that respecting diplomatic immunity of foreign states "ensures that similar protections will be accorded" to the United States). That damaging consequence is one that Congress would have wanted to avoid in enacting the strong immunity protections in the FSIA.

B. The Court Of Appeals Erred In Ruling That Jurisdiction Was Proper So Long As Respondents' Allegations That The Substantive Standards Of The Expropriation Exception Were Satisfied Were Not "Wholly Insubstantial Or Frivolous"

The court of appeals did not undertake the required analysis. Instead of determining whether H&P-V's allegations actually state a violation of inter-

national law and whether H&P-IDC's allegations actually place its own "rights in property" in issue, the court—applying an "exceptionally low" standard—considered only whether respondents' allegations on those points are "wholly insubstantial or frivolous." Pet. App. 11a (citation omitted); see *id.* at 16a, 20a. The court thus did not correctly resolve those elements of the immunity inquiry.[4]

1. In framing the jurisdictional question as whether respondents' expropriation claims were frivolous, the court of appeals relied only on this Court's decision in *Bell* v. *Hood*, 327 U.S. 678 (1946), which construed the "arising under" requirement in the federal-question jurisdictional statute, now 28 U.S.C. 1331. See Pet. App. 11a (citing *Bell*, 327 U.S. at 682, and *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008), which also cites *Bell*). That reliance was misplaced. Cf. *Verlinden*, 461 U.S. at 494-495 (finding that court of appeals erred in importing federal-question-statute precedent into FSIA context); *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 258 (1992) (explaining that Section 1331

---

[4] In contrast, other courts of appeals (with the exception of the Ninth Circuit) have understood the inquiry under Section 1605(a)(3) to require a decision about the legal sufficiency of the allegations. See *Mezerhane* v. *República Bolivariana de Venezuela*, 785 F.3d 545, 548-551 (11th Cir. 2015) (holding that the claim did not come within the expropriation exception because the foreign state's alleged actions did not constitute a taking in violation of international law), cert. denied, 136 S. Ct. 800 (2016); *Zappia Middle East Constr. Co.*, 215 F.3d at 251 (same); *de Sanchez*, 770 F.2d at 1394-1398 (same); *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 678-685 (7th Cir. 2012) (same); see also *Siderman de Blake* v. *Republic of Arg.*, 965 F.2d 699, 711 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993).

pleading rule should not have been invoked with respect to "jurisdiction based on a separate and independent jurisdictional grant").

The federal-question statute confers on federal courts jurisdiction over any action that "aris[es] under" the Constitution, treaties, or laws of the United States. 28 U.S.C. 1331; see 28 U.S.C. 41(1) (1940) (version of statute discussed in *Bell*). That statute is not a source of substantive law. See, *e.g.*, *Mims* v. *Arrow Financial Servs., LLC*, 132 S. Ct. 740, 748-749 (2012). Rather, it grants federal courts power to hear "a particular class of cases," *Verlinden*, 461 U.S. at 496—those asserting "a right to recover under the Constitution and laws of the United States," *Bell*, 327 U.S. at 681; see *Merrill Lynch* v. *Manning*, 136 S. Ct. 1562, 1570 (2016).

As *Bell* explains, a claim "arises under" federal law if the claim will be "sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." 327 U.S. at 685; see *Manning*, 136 S. Ct. at 1569-1570. Thus, the federal-question statute has been understood to separate the jurisdictional inquiry from any examination of the legal sufficiency of the plaintiff's claim: a claim may "aris[e] under" federal law even if the court's ultimate construction of federal law will defeat that claim. See *Bell*, 327 U.S. at 685; see also, *e.g.*, *Swafford* v. *Templeton*, 185 U.S. 487, 493-494 (1902). The Court applied that principle in *Bell*, holding that "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." 327 U.S. at 682. The Court also explained, however, that a suit asserting an "alleged claim under the Constitution or federal stat-

utes" that "is wholly insubstantial and frivolous" may be "dismissed for want of jurisdiction." *Id.* at 682-683; see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-90 (1998) (collecting cases).

The D.C. Circuit has understood *Bell* to establish a more general rule, equally applicable to the FSIA as to the federal-question statute, that "[j]urisdiction . . . is not defeated . . . by the possibility that" a complaint "might fail to state a cause of action." Pet. App. 11a (quoting *Bell*, 327 U.S. at 682); see *Chabad*, 528 F.3d at 940. That court has accordingly held that whenever "the plaintiff's claim on the merits directly mirror[s] the jurisdictional standard" set forth in the FSIA, the district court should find the jurisdictional standard satisfied and the foreign state amenable to suit so long as the plaintiff's claim is not frivolous. *Simon* v. *Republic of Hungary*, 812 F.3d 127, 140 (2016). When the "jurisdictional and merits inquiries" are not "fully overlap[ping]," however, the district court is to undertake a more stringent inquiry that asks "whether the plaintiffs' allegations satisfy the jurisdictional standard." *Id.* at 141; see *ibid.* (declining to apply the frivolousness standard to inquiry under the expropriation exception because plaintiffs asserted common-law claims (such as conversion) on the merits and alleged a taking that violated international law only to establish jurisdiction).[5] Although the D.C. Circuit has thus

---

[5] The D.C. Circuit assumed that the jurisdictional and merits inquiries "fully overlap" under Section 1605(a)(3) when a plaintiff pleads a cause of action against a foreign state asserting a taking in violation of international law, rather than a garden-variety state-law claim (like conversion, restitution, or breach of contract) in which the property that is the subject of the suit is alleged to have been taken in violation of international law. *Simon*, 812 F.3d

far applied that rule only in cases involving the expropriation exception, it appears that the court may extend its rule to cases involving other exceptions to foreign-state immunity.[6]

The D.C. Circuit's approach is founded on a misunderstanding of the scope of *Bell*. Rather than announcing a general rule that applies to other jurisdictional grants without regard to their text, *Bell* rested on an interpretation of the federal-question statute, see 327 U.S. at 680, 683, which has its own language, "history," and "judicial policy" considerations, *Manning*, 136 S. Ct. at 1570 (citation omitted), and which does not contain any substantive limitations. *Bell*'s frivolousness standard is merely a way of ascertaining whether a claim is so plainly not a true assertion of a right of recovery pursuant to federal law that it cannot be said to fall within the bounds of the broad category marked out by the "arising under" requirement. See 327 U.S. at 682-683; see also *Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

---

at 141. But the D.C. Circuit did not address whether there would be a distinct cause of action based directly on an alleged taking in violation of international law, and that issue is not presented here. See Pet. App. 12a (describing respondents' claims as "international expropriation claim[s]" without further discussion); J.A. 103-104; cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004).

[6] See *Owens* v. *Republic of Sudan*, No. 01-2244, 2016 WL 1170919, at *22-*25 (D.D.C. Mar. 23, 2016) (applying rule in *Simon* to case involving 28 U.S.C. 1605A, an immunity exception for claims for personal injury or death "caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking"); see also, *e.g.*, 28 U.S.C. 1605(a)(5) (immunity exception for claims for personal injury or death "caused by the tortious act or omission of [a] foreign state").

That standard has no application to the FSIA. Unlike the federal-question statute, the FSIA does not merely address the question of subject-matter jurisdiction over a general category of cases. Instead, it establishes substantive federal immunity standards that both state and federal courts must apply at the outset to determine whether a foreign state is amenable to suit at all. *Verlinden*, 461 U.S. at 493, 497; see pp. 11-18, *supra*; see also *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514-515 & n.11 (2006) (explaining that Congress may condition subject-matter jurisdiction on satisfying a substantive requirement). Thus, "deciding whether statutory subject-matter jurisdiction exists under the [FSIA] entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies." *Verlinden*, 461 U.S. at 497-498. And among the expropriation exception's substantive standards is that the claim must put in issue "rights in property taken in violation of international law." 28 U.S.C. 1605(a)(3). That exception therefore requires a legal inquiry that the federal-question statute eschews: jurisdiction under Section 1605(a)(3) turns on the legal sufficiency of the plaintiff's claim that the alleged taking violated international law.[7]

---

[7] This Court recently interpreted a jurisdictional provision worded differently than the federal-question statute to embody the same "jurisdictional test" that has been "formulated for § 1331." *Manning*, 136 S. Ct. at 1570. But the provision involved in that case—conferring jurisdiction over suits "brought to enforce any liability or duty created by" certain securities-law provisions, 15 U.S.C 78aa(a)—is similar to the federal-question statute, and distinct from the FSIA, in asking only about the general nature of a plaintiff's claim (not its substance) and in governing claims as to which there is no presumptive immunity.

The required legal inquiry under the FSIA reflects Congress's judgment about the limited scope of the exceptions to immunity, which in turn stems from important comity and foreign-relations concerns that are unique to suits against foreign states. That judgment and those underlying concerns have no relevance to a jurisdictional determination under the federal-question statute. In establishing a framework that starts with a presumption that a foreign state "shall be immune" from "jurisdiction," 28 U.S.C. 1604, Congress did not intend that a foreign state would be subjected to the burdens of suit based merely on non-frivolous allegations that the FSIA's requirements have been satisfied.

The ill fit between *Bell* and the FSIA is emphasized by the extent to which the D.C. Circuit has departed from the FSIA's text and purposes in creating two different jurisdictional standards—one that applies if the merits of the underlying cause of action "fully overlap" with an element of the jurisdictional inquiry, and another that applies if partial or no overlap exists. *Simon*, 812 F.3d at 141. That elaborate jurisdictional superstructure is nowhere to be found in the relevant provisions of the FSIA, and it is divorced from the statute's underlying goals. Cf. *Chabad*, 528 F.3d at 955-957 & n.3 (Henderson, J., concurring). Congress mandated a careful, substantive inquiry into whether a foreign state is immune from jurisdiction in every case, not just in a limited class of cases.

2. Other rationales that have been advanced by respondents in support of the "exceptionally low" standard applied by the court of appeals, Pet. App. 11a, also fail to justify use of that standard to make jurisdictional determinations under the FSIA.

First, it is not correct to say (*e.g.*, Resp. Supp. Br. 8) that Section 1605(a)(3) merely requires "assert[ion]" of "a certain type of claim"—that is, that a plaintiff must merely assert as a (non-frivolous) legal conclusion that its rights in property have been taken in violation of international law in order to clear the hurdle of Rule 12(b)(1). *Chabad*, 528 F.3d at 941. Section 1605(a)(3) could, of course, have been worded to refer to claims "alleging" or "asserting" a taking of property in violation of international law, see, *e.g.*, 15 U.S.C. 8405, or to claims "arising under" or "brought to enforce" international law, see *Manning*, 136 S. Ct. at 1570-1575.[8] But Congress chose in Section 1605(a)(3) to impose substantive requirements rather than simply to describe the subject matter of the suit. See *Verlinden*, 461 U.S. at 496 (distinguishing FSIA from statutes that "do nothing more than grant jurisdiction over a particular class of cases").

Second, a more searching standard than the D.C. Circuit's is not unworkable merely because a determination of whether Section 1605(a)(3) applies may also involve examination of questions that are pertinent to the merits of the plaintiff's claim. See Resp. Supp. Br. 7-8. Other courts of appeals deciding expropriation-related FSIA cases have applied the correct legal standard without any difficulty. See note 4, *supra*; see also *Arbaugh*, 546 U.S. at 515 n.11 (discussing Congress's "prerogative" to define jurisdiction by imposing substantive requirements that may be "relevant to

---

[8] Indeed, Congress did use "arising out of" language in Section 1605 when it so intended. See 28 U.S.C. 1605(a)(5)(B) (stating that the domestic-torts exception does not apply to "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").

the merits of a case"). Outside the FSIA context, concerns that have arisen about a robust jurisdictional inquiry in cases of overlap with the merits are often driven by a prospect that a plaintiff may be deprived of a right to have a jury resolve disputed factual questions. See, *e.g.*, *Arbaugh*, 546 U.S. at 514. But the Rule 12(b)(1) motion in this case makes only a legal challenge to the sufficiency of the jurisdictional allegations, and in any event no plaintiff in an action against a foreign sovereign is ever entitled to a jury trial. See 28 U.S.C. 1330(a) and 1441(d).

It is, in fact, the D.C. Circuit's approach that raises practical difficulties. See generally *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) ("administrative simplicity is a major virtue in a jurisdictional statute"). It would not always be clear whether the jurisdiction and the merits sufficiently "mirror[]" each other to meet the D.C. Circuit's atextual standard. *Simon*, 812 F.3d at 140-141. Application of that standard could result in very similar FSIA cases being decided under different (and sometimes outcome-determinative) jurisdictional analyses, giving rise to confusion among foreign states and other litigants. See *ibid.*; see also *Verlinden*, 461 U.S. at 487-488, 497 (acknowledging need for uniformity under FSIA so that foreign states do not perceive unequal treatment). And the D.C. Circuit's requirement strongly encourages plaintiffs to "recast" their claims to try to achieve the necessary correspondence between the jurisdictional and merits inquiries—the kind of practice on which this Court has frowned as a means of bypassing sovereign-immunity protections. *Nelson*, 507 U.S. at 363; see *ibid.* (refusing to give "jurisdictional significance" to "feint of

language"); see also *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 396 (2015).

Finally, the problems associated with the D.C. Circuit's standard cannot be obviated simply by pointing to the foreign state's ability to file a Rule 12(b)(6) motion to dismiss for failure to state a claim. See Resp. Supp. Br. 6 (citing *Robinson* v. *Government of Malaysia*, 269 F.3d 133, 149 n.1 (2d Cir. 2001) (Sotomayor, J., concurring)). Assuming that the plaintiff's cause of action in a case involving Section 1605(a)(3) can ever overlap completely with the substantive requirements of that exception, see note 5, *supra*, a Rule 12(b)(6) motion would provide a way of testing whether a plaintiff's allegations, taken as true, made out a taking in violation of international law. But if the foreign state made a Rule 12(b)(6) motion and lost, that decision would not be appealable, and the case would proceed to full discovery, dispositive motions, and (perhaps) a bench trial. By contrast, the denial of a Rule 12(b)(1) motion asserting sovereign immunity in an FSIA case may be appealed immediately, thus helping to ensure that a foreign state's immunity is truly an "immunity from suit" and not merely an immunity from liability. *Moran*, 27 F.3d at 172.

3. Application of the D.C. Circuit's "exceptionally low" standard for establishing jurisdiction under Section 1605(a)(3) in a case like this one, Pet. App. 11a, may well do real harm. Recognizing that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States," *Verlinden*, 461 U.S. at 493, Congress carefully crafted the FSIA's exceptions to immunity to take into account prevailing customary international-law

standards of foreign state immunity, *id.* at 487-488. The D.C. Circuit's use of the frivolousness standard effectively nullifies key elements of the immunity analysis under the expropriation exception, and subjects a foreign state to the power of another sovereign's judicial system and the burdens of litigation, whenever the plaintiff can muster a non-frivolous argument that it has "rights in property" and that international law could be interpreted to prohibit the alleged taking. That permissive approach could result in adverse foreign-relations consequences and reciprocal adverse treatment of the United States in foreign courts. See pp. 20-22, *supra*.

C. The Judgment Should Be Vacated And The Case Remanded For Further Consideration Under The Correct Legal Standard

Because the court of appeals applied an insufficiently rigorous standard, it failed to determine whether respondents' allegations satisfied Section 1605(a)(3)'s requirements.

With respect to whether respondent H&P-V's expropriation claim satisfied Section 1605(a)(3)'s requirement that a "tak[ing] in violation of international law" be "in issue," 28 U.S.C. 1605(a)(3), the court of appeals held only that H&P-V's argument was "non-frivolous," Pet. App. 17a (citation omitted). The court acknowledged that international law does not generally speak to a sovereign's actions with respect to the property of its own nationals, but believed that a colorable argument could be mustered that a corporate plaintiff's own nationality may be disregarded "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders." *Id.* at 14a (citation omitted). That ruling set the bar for

making the jurisdictional determination too low. The court should, instead, have answered the legal question before it and definitively ruled on whether a "generally accepted norm" of international expropriation law prohibits the taking of a domestic corporation's property to discriminate against foreign shareholders. *de Sanchez*, 770 F.2d at 1396.

The court of appeals made the same error with respect to whether respondent H&P-IDC adequately alleged that its own "rights in property" were "in issue." 28 U.S.C. 1605(a)(3); see Pet. App. 22a. The court recognized that "[a] corporation and its shareholders are distinct entities" and that a shareholder generally does not have an ownership interest in the corporation's property. *Dole Food*, 538 U.S. at 474-475. But the court nonetheless held that H&P-IDC might have "rights in" respondent H&P-V's property for purposes of Section 1605(a)(3), without examining the source or scope of those potential rights. Pet. App. 19a-22a. The court should, instead, have determined whether respondents' allegations were legally sufficient to place H&P-IDC's "rights in property" in issue. The court should have first examined whether the law of the state of H&P-V's incorporation—Venezuela—gave H&P-IDC, as H&P-V's shareholder, any direct rights. See *Case Concerning the Barcelona Traction, Light & Power Co.* (*Belgium* v. *Spain*), 1970 I.C.J. 3, ¶ 47 (Feb. 5). The court then should have considered whether any such rights constitute "rights in property" for purposes of Section 1605(a)(3). See *Permanent Mission*, 551 U.S. at 198-199. Finally, had it identified any relevant "rights in property," the court should have determined whether the complaint sufficiently alleges that "rights in property [were]

taken in violation of international law." 28 U.S.C. 1605(a)(3).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for consideration under the proper standard.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
BRIAN J. EGAN
Legal Adviser
Department of State
SHARON SWINGLE
LEWIS S. YELIN
Attorneys

AUGUST 2016

APPENDIX

1. 28 U.S.C. 1330 provides:

Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

2. 28 U.S.C. 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

3. 28 U.S.C. 1602 provides:

Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity

from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

4. 28 U.S.C. 1603 provides:

Definitions.

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of

this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

5. 28 U.S.C. 1604 provides:

Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

6. 28 U.S.C. 1605 provides:

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in im-

movable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the

United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110-181, div. A, title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery

on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The Court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

7. 28 U.S.C. 1605A provides:

Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign

state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this sec-

tion) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the

effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

8. 28 U.S.C. 1606 provides:

Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the

action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

9. 28 U.S.C. 1607 provides:

Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

10. 28 U.S.C. 1608 provides:

Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the

clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

11. 28 U.S.C. 1609 provides:

Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

12. 28 U.S.C. 1610 provides:

Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in viola-

tion of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of

execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or

prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state un-

der the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

13. 28 U.S.C. 1611 provides:

Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the

bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

Supreme Court, U.S.
FILED
OCT - 3 2016
OFFICE OF THE CLERK

No. 15-423

IN THE

Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., AND PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., AND HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER STATE DEPARTMENT ATTORNEYS JOHN NORTON MOORE AND EDWIN D. WILLIAMSON AS AMICI CURIAE IN SUPPORT OF RESPONDENT

MICHAEL J. GOTTLIEB
Counsel of Record
RYAN Y. PARK
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Suite 800
Washington, DC 20015
(202) 237-2727
mgottlieb@bsfllp.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE FSIA REPRESENTS A DECISION BY THE EXECUTIVE BRANCH AND THE CONGRESS TO ENTRUST SOVEREIGN IMMUNITY DECISIONS TO THE COURTS 4

A. The Views Of The Executive Branch At The Time Of The FSIA's Drafting And Enactment Are Relevant To Interpreting The Statute 4

B. The Executive Branch Designed The FSIA To Transfer Responsibility For Foreign Sovereign Immunity Determinations From The Executive To The Judicial Branch 6

C. Traditional Methods Of Statutory Interpretation Should Guide Judicial Interpretation Of The FSIA 10

II. THE EXPROPRIATION EXCEPTION WAS DESIGNED TO ALLOW EXPROPRIATION CLAIMS TO BE HEARD ON THE MERITS IN FEDERAL COURT 15

A. Congress Enacted The Expropriation Exception To Provide An Adequate Remedy For A Serious Foreign Policy Concern 15

TABLE OF CONTENTS—Continued

Page

B. Petitioners' Heightened Threshold Requirements Would Frustrate The Purposes Of The FSIA 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page(s)

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) 7, 16

Bell v. Hood, 327 U.S. 678 (1946) 4

Ex Parte Republic of Peru, 318 U.S. 578 (1943) 11

Hagans v. *Lavine*, 415 U.S. 528 (1974) 22

Int'l Primate Prot. League v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991) 6

Morrison v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010) 21

Nat'l City Bank v. *Republic of China*, 348 U.S. 356 (1955) 8, 11

Republic of Argentina v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) 5, 6

Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607 (1992) 15

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 5, 11, 13, 14

TABLE OF AUTHORITIES—Continued

Page(s)

Republic of Iraq v. *Beaty*,
556 U.S. 848 (2009) 14

Republic of Mexico v. *Hoffman*,
324 U.S. 30 (1945) 11

Republic of Philippines v. *Pimentel*,
553 U.S. 851 (2008) 12

Saudi Arabia v. *Nelson*,
507 U.S. 349 (1993) 13

The Paquette Habana,
175 U.S. 677 (1900) 21

United States v. *Cooper Corp.*,
312 U.S. 600 (1941) 6

United States v. *Curtiss-Wright Exp. Corp.*,
299 U.S. 304 (1936) 11

Verlinden B.V. v. *Cent. Bank of Nigeria*,
461 U.S. 480 (1983) 7, 8, 14

Zschernig v. *Miller*,
389 U.S. 429 (1968) 11

STATUTES

22 U.S.C. § 2651a 1

28 U.S.C. § 1330(a) 14

28 U.S.C. § 1602 11

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1605(a)(3) ..... *passim*

LEGISLATIVE MATERIALS

H. Comm. on Foreign Affairs, 88th Cong., *Report on Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century* (Comm. Print 1963), 2 I.L.M. 1066 (1963) 16

Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Gov't Relations of the H. Comm. on the Judiciary, 93d Cong. 33 (1973) 8, 10, 14, 19

H.R. Rep. No. 94-1487 (1976) 10, 14

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary, 94th Cong. 26 (1976) .. 9, 16, 18

TREATISES

5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 2016) 21

OTHER AUTHORITIES

Brief of the United States as Amicus Curiae, *Filartiga* v. *Pena-Irala*, No. 79-6090, 1980 WL 340146 (2d Cir. 1980) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Bureau of Labor Statistics, *BLS Inflation Calculator* 17

Gerald R. Ford, Former President, *Statement on Signing the Foreign Sovereign Immunities Act of 1976*, October 22, 1976 10

Robert S. Ingersoll, Deputy Sec. of State, & Harold R. Tyler, Jr., Deputy Attorney Gen., Letter to Carl O. Albert, Speaker of the House of Representatives, Oct. 31, 1975, *reprinted in* H.R. Rep. No. 94-1487 (1976) 10

Robert A. Katzmann, *Judging Statutes* (2015) 6

Note, *Avoiding Expropriation Loss*, 79 Harv L. Rev. 1666 (1966) 7

Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607 (1962) 7

Ronald Mok, *Expropriation Claims in United States Courts: The Act of State Doctrine, The Sovereign Immunity Doctrine, and the Foreign Sovereign Immunities Act*, 8 Pace Int'l L. Rev. 199 (1996) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Jack Tate, Acting Legal Adviser,
Letter to Acting Attorney General Perlman
(1952), *reproduced in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S.
682 (1976) 7

U.S. Dep't of State,
1 Foreign Affairs Manual 241.1(1) 2

U.S. Dep't of State,
Policy on Treatment of Foreign State Immunity, U.S. Fed. Reg. Vol. 41, No. 224
(1976) 12

White House Press Release, *U.S. Statement on Economic Assistance and Investment in Developing Nations* (Jan. 19, 1972),
11 I.L.M. 239 (1972) 18

INTEREST OF AMICI CURIAE[1]

Amici are former Executive Branch officials who served as senior attorneys in the U.S. Department of State, with responsibility for advising the Executive Branch on issues of international law.

John Norton Moore is the Walter L. Brown Professor of Law at the University of Virginia Law School, and is one of the nation's foremost experts on international law. Professor Moore served as Counselor on International Law to the Department of State in the early 1970s, where he participated both in the drafting of the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act") as submitted by the Executive to the Congress and in clearing the draft FSIA law through the interagency process within the Executive Branch. In that capacity, Professor Moore worked with the Department of Treasury's designated representative in the interagency process to draft the FSIA's "expropriation exception," 28 U.S.C. § 1605(a)(3), the purpose of which was to provide a judicial forum in the United States for claims against foreign sovereigns alleged to have taken property in violation of international law.

Edwin D. Williamson served as the Legal Adviser for the U.S. Department of State from 1990 to 1993. The Legal Adviser, an Assistant Secretary of State, 22 U.S.C. § 2651a, has responsibility for

---

[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici curiae or their counsel made a monetary contribution to its preparation or submission.

advising the Department and Executive Branch "on all legal and legal policy issues arising in connection with U.S. foreign policy and the work of the Department." 1 Foreign Affairs Manual § 241.1(1). The Legal Adviser is the highest-ranking legal officer in the Executive Branch with specific responsibility on matters of international law

SUMMARY OF ARGUMENT

The chief purpose of the FSIA was to promote adjudication of certain types of claims against foreign sovereigns according to the rule of law. The FSIA achieved this objective by replacing longstanding U.S. practice in which courts yielded to the Executive's discretionary "suggestions" with a comprehensive statutory framework that the federal courts interpret and apply according to traditional methods of statutory interpretation. The FSIA was designed to confer jurisdiction in some cases and preclude it in others—it was not, however, intended to erect a "presumption" of sovereign immunity that must be overcome before a federal court may exercise subject matter jurisdiction over the merits of any claim against a foreign state.

As this Court has recognized, Congress enacted the FSIA to create a comprehensive regulatory regime controlling the immunity of foreign sovereigns in U.S. courts. The overriding purpose of the FSIA was to remove discretionary and policy-driven considerations from the sovereign immunity calculus and replace them with concrete statutory rules to be applied by the federal courts. Meanwhile, as this Court has previously

recognized, courts ought not add extra requirements where the FSIA creates none. The exceptions Congress enumerated in the FSIA define categories of cognizable claims for which sovereign immunity is expressly denied, and the Act's text addresses the scope of those exceptions. There is no indication in the FSIA's text, structure, or legislative history that these exceptions were meant to be limited by additional judicially-implied presumptions. The principles of "international comity" and the "dignity" of foreign sovereigns—while generally important concepts that animated Congress's decision to grant or deny immunity for certain categories of claims—are not relevant to the interpretive task before this Court, which is to identify the appropriate pleading standard applicable to claims brought under the expropriation exception.

The expropriation exception was the product of a concerted effort by both the Executive Branch and Congress to respond to the widespread expropriation of U.S.-owned assets by foreign sovereigns, particularly in communist countries like Cuba following Fidel Castro's rise to power. The year before the Executive Branch drafted the FSIA, the White House announced a series of retaliatory measures against foreign sovereigns that expropriated property owned by American citizens. Congress included the expropriation exception in the FSIA to expand upon these measures by supplying victims of expropriation with a remedy directly against foreign sovereigns in U.S. courts. It is therefore backwards to assert, as the United States does in its *amicus curiae* brief, that principles of reciprocity require a narrow

interpretation of the expropriation exception. The purpose of the exception was to *achieve* reciprocity vis-à-vis expropriating nations that, like Venezuela here, could otherwise seize the assets of U.S. citizens and others with impunity.

Petitioners' proposed heightened standard for pleading jurisdiction over expropriation claims would depart from the text, structure, and history of the exception, and frustrate its purpose. Congress and the Executive Branch designed the expropriation exception to empower federal courts to resolve disputes as to whether a foreign sovereign's expropriation violated international law in the ordinary course. Nothing in the Act supports subjecting expropriation claims to heightened jurisdictional hurdles. At the time of the FSIA's enactment, Congress was well aware of the *Bell* v. *Hood* standard, which this Court had reaffirmed while Congress was considering the draft bill that would become the FSIA. The court of appeals' judgment applying that well-established standard to the FSIA's expropriation exception should be affirmed.

ARGUMENT

I. THE FSIA REPRESENTS A DECISION BY THE EXECUTIVE BRANCH AND THE CONGRESS TO ENTRUST SOVEREIGN IMMUNITY DECISIONS TO THE COURTS

A. The Views Of The Executive Branch At The Time Of The FSIA's Drafting And Enactment Are Relevant To Interpreting The Statute

This Court has repeatedly confirmed that the FSIA is interpreted and applied just like any other

statute, with "no special deference" to the views of the United States as *Amicus Curiae*. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) ("The issue now before us, to which the Brief for United States as *Amicus Curiae* is addressed, concerns interpretation of the FSIA's reach—a pure question of statutory construction . . . well within the province of the Judiciary. While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference.") (internal citation and quotation marks omitted). As a result, since "Congress abated the bedlam" of Executive discretion in matters of foreign sovereign immunity by enacting the FSIA, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text" and other indicia of congressional intent, not on Executive Branch preferences for one policy or another. *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255-2256 (2014).

The meaning of the FSIA's text must be understood in light of the articulated views of both the Executive Branch and Congress at the time the FSIA was enacted. The FSIA, like many statutes of its kind, was originally drafted and considered by the Executive Branch, which submitted the draft statute to Congress. *See infra* at 10-12; *see also* Robert A. Katzmann, *Judging Statutes* 26 (2015) (noting that "Executive branch staffers often draft bills that [congressional] committees consider . . . ."). Executive Branch officials continued to assist Congress during its deliberations over the FSIA, including by advising lawmakers as to the intended scope and purpose of particular exceptions to immunity, and by submitting a revised draft bill to

reflect Congress's concerns with the initial draft. *See infra* at 10-12. The Executive Branch's contemporaneous understanding of the FSIA therefore offers helpful guidance in understanding the scope of the FSIA's text. *See, e.g., Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991) ("[T]he purpose, the subject matter, the context, the legislative history, or the executive interpretation of the statute [may] indicate an intent . to bring [a] state or nation within the scope of the law.") (quoting *United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941)).

B. The Executive Branch Designed The FSIA To Transfer Responsibility For Foreign Sovereign Immunity Determinations From The Executive To The Judicial Branch

Foreign sovereign immunity is regulated by the FSIA's "comprehensive" statutory scheme. *NML Capital*, 134 S. Ct. at 2255 ("The key word . is *comprehensive*."). For most of our nation's history, however, the Executive Branch played a large role in determining whether claims against foreign sovereigns should be allowed to proceed in U.S. courts. *Verlinden B.V.* v *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Over time, that role expanded to the point where, by the mid-twentieth century, "courts increasingly . . inclined toward the view that sovereign immunity [was] a political rather than a legal matter and rarely . questioned the propriety of executive suggestions." Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1612 (1962).

In the mid-twentieth century, at the State Department's initiative, the Executive Branch's foreign sovereign immunity determinations began to shift from a discretionary matter to a regime governed by the rule of law. In 1952, Acting Legal Adviser Jack Tate issued the "Tate Letter," in which he announced that the Department of State would adopt the "restrictive theory" of sovereign immunity as a blanket policy. Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952), *reproduced in Alfred Dunhill of London, Inc.* v *Republic of Cuba*, 425 U.S. 682, 714 (1976) ("Tate Letter"); Resp. Br. 32-33. The "restrictive" theory permitted claims to proceed in federal court against foreign sovereigns for their "private acts," while maintaining sovereign immunity for "public acts." *Ibid.* Even under the Tate Letter's restrictive theory, however, expropriation was not a "private" state act, and thus foreign states remained immune from expropriation claims in U.S. courts. Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666, 1666 (1966).

Following the Tate Letter, foreign sovereign immunity determinations continued to be conducted on a case-by-case basis based on the recommendation of the Department of State. *See Nat'l City Bank* v. *Republic of China*, 348 U.S. 356, 360 (1955) ("As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit."). Because "foreign nations often placed diplomatic pressure on the State Department in seeking immunity," the State Department's

recommendations to the courts sometimes departed from the restrictive theory of immunity ostensibly established by the Tate Letter. *Verlinden*, 461 U.S. at 487.

In 1973, the Executive Branch sought to remove the question of foreign sovereign immunity from its discretion entirely. That year, the Department of State and the Department of Justice jointly submitted a draft bill to Congress that would become the Foreign Sovereign Immunities Act of 1976. In their letter accompanying the draft bill, the Secretary of State and Attorney General noted that then-current sovereign immunity law was "the result of the joint articulation of the law by the judiciary and the Department [of State]." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Gov't Relations of the H. Comm. on the Judiciary*, 93d Cong. 33 (1973) ("*1973 House Hearing*") (Letter from Richard G. Kleindienst, Attorney Gen., and William P Rogers, Sec. of State, to the Speaker of the House). "The central principle of the draft bill" that would become the FSIA, they wrote, was "to make the question of a foreign state's entitlement to immunity an issue justiciable by the courts, without participation by the Department of State." *Id.* at 34.

Legal Adviser Monroe Leigh argued to Congress that, under the Tate Letter, the State Department was presented with a "devil's choice." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 26 (1976) ("*1976 House Hearing*") (Testimony of Monroe

Leigh, State Dep't Legal Adviser). By following the Tate Letter, the State Department was in the "incongruous position of a political institution trying to apply a legal standard to litigation already before the courts. On the other hand, if forced to disregard the Tate letter in a given case, the Department [was] in the self-defeating position of abandoning the very international law principle it elsewhere espouse[d]." *Ibid.* Seeking to remove itself from this bind, the Executive Branch's draft bill largely sought to codify the Tate Letter's "restrictive theory" of sovereign immunity. "The restrictive theory rests, at bottom, on the consideration that the widespread practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." *1976 House Hearing* 30 (Testimony of Bruno A. Ristau, Chief of the Foreign Litig. Section, Civil Div., Dep't of Justice).

The Executive Branch's draft bill also included a new limit on foreign sovereign immunity that went beyond the restrictive theory of immunity adopted by the Tate Letter: the "expropriation exception" of Section 1605(a)(3).[2] In a section-by-section analysis accompanying the draft bill, its authors explained

---

[2] The text of the expropriation exception as drafted, revised, and submitted to Congress by the Departments of State and Justice was identical to the text passed into law by Congress as Section 1605(a)(3), where it remains today. *Compare* Revised Draft Bill Enclosed with Executive Communication to the Speaker of the House, H.R. Rep. No. 94-1487, at 48 (1976), *with* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 1605(a)(3), 90 Stat. 2891 (1976), *and* 28 U.S.C. § 1605(a)(3).

that the expropriation exception would strip immunity from foreign states and their instrumentalities for the purpose of lawsuits to recover expropriated property. *1973 House Hearing* 41.

After deliberation in the Congress, and further communication with the Executive Branch, the Departments of State and Justice submitted a revised draft bill in 1975. Letter from Robert S. Ingersoll, Deputy Sec. of State, & Harold R. Tyler, Jr., Deputy Attorney Gen., to Carl O. Albert, Speaker of the House of Representatives, Oct. 31, 1975, *reprinted in* H.R. Rep. No. 94-1487 at 44-45 (1976). The revised draft included the identical expropriation exception. The bill passed the House on September 29, 1976 and the Senate on October 1. President Ford signed it into law on October 21. *Statement by the President on Signing H.R. 11315 Into Law*, PRESIDENTIAL DOCUMENTS: GERALD R. FORD, 1976 (Oct. 22, 1976).

C. Traditional Methods Of Statutory Interpretation Should Guide Judicial Interpretation Of The FSIA

Consistent with the enactment history described above, Congress expressed that among its central purposes in enacting the FSIA was to remove foreign sovereign immunity determinations from the Executive, and to entrust those determinations to the federal courts. *See* 28 U.S.C § 1602. The overriding goal was to replace what had been perceived as a policy-driven, discretionary system with a concrete and "comprehensive" set of legal rules that would "govern[] claims of immunity in every civil action against a foreign state or its

political subdivisions, agencies, or instrumentalities." *Altmann*, 541 U.S. at 691. Congress explained that enacting clear and uniform statutory rules to guide judicial immunity determinations "would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C § 1602. Accordingly, to the extent that Congress was concerned with "comity between nations" and "the dignity of foreign sovereigns," *see* U.S. Br. 20, those concerns were reflected in the enacted text of the FSIA.[3]

The enactment history described above demonstrates that discretionary considerations of "international comity" or "sovereign dignity" were not designed to control judicial interpretation of the Act's exceptions. Those concepts were important to the FSIA's identification of claims over which immunity would be available or unavailable, but they were not intended to operate as a further barrier against plainly exempted claims such as expropriation or commercial activities. Instead, like

---

[3] In asserting that general principles of international comity and foreign sovereign dignity are relevant here, the United States cites predominantly to cases decided before the FSIA's enactment in 1976. *See* U.S. Br. 20-21 (citing *Nat'l City Bank* v. *Republic of China*, 348 U.S. 356 (1955); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936)). The lone post-FSIA Supreme Court case cited by the United States is completely inapt. In that case, the Court was not even addressing the FSIA but rather the necessary joinder standard under Rule 19(b). *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 865 (2008); *see ibid.* (noting the parties' agreement that none of the FSIA's exceptions applied and that "[i]mmunity in this case, then, is uncontested").

Congress, the Executive Branch believed that committing sovereign immunity questions to the federal courts, to be resolved in accordance with concrete statutory rules, would "be a significant step in the growth of international order under law, to which the United States has always been committed." U.S. Dep't of State, *Policy on Treatment of Foreign State Immunity*, U.S. Fed. Reg. Vol. 41, No. 224, p. 50883-50884 (Nov. 18, 1976) (statement of the State Department Legal Adviser). In other words, the Executive Branch expected the FSIA to be interpreted in accordance with its text—without consideration of the current administration's position on how a particular case might affect international comity or sovereign dignity. Indeed, considering such factors would be flatly inconsistent with the Executive Branch's position that enactment of the FSIA was necessary to relieve it of the "devil's choice" between adhering to the legal principles and yielding to international and political pressures to "abandon[]" those principles. *1976 House Hearing* 26.

Contrary to the suggestions of Petitioners and the United States, there is no generally applicable "presumption" in favor of sovereign immunity separate from what is reflected in the text and structure of the FSIA. Pet. Br. 17-18; U.S. Br. 9. While it is true that the FSIA provides a "general grant of immunity" for foreign sovereigns, it also "carves out certain exceptions" that "are central to the Act's functioning." *Altmann*, 541 U.S. at 691. "A foreign state *shall not be immune* from the jurisdiction of courts of the United States" where one of these exceptions apply. 28 U.S.C. § 1605(a) (emphasis added); *see id.* § 1604 (providing that a

foreign state "shall be immune from the jurisdiction of the courts of the United States and of the States *expect as provided* in sections 1605 to 1607 of this chapter") (emphasis added). Sections 1604 and 1605(a)'s equal and opposite language reflect the twin essential aspects of the FSIA's scheme: in addition to providing a general grant of immunity to foreign sovereigns, the Act was intended to grant jurisdiction and *deny* immunity for certain types of claims, thereby offering a federal forum for those claims' resolution. Far from being "express," Pet. Br. 14, Petitioners' supposed "presumption of immunity" has no basis in the FSIA's text.

Petitioners rest their claim that there is a "presumption" of immunity on one use of the word "presumptively" in *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993) ("Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts[,] unless a specified exception applies ") (citing *Verlinden*, 461 U.S. at 488-489). But in *Verlinden*, this Court used a different word: "A foreign state is *normally* immune from the jurisdiction of federal and state courts, subject to a set of exceptions . . . " *Verlinden*, 461 U.S. at 488 (emphasis added). *Verlinden* correctly described the FSIA's scheme. Foreign states may be "normally," "ordinarily," *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009), or even "general[ly]," *Altmann*, 541 U.S. at 691, immune from suit in federal and state courts, but that does not make them *presumptively* so. Under the plain text of the Act, where a claim against a foreign sovereign falls under one of the FSIA's exceptions, such as when a foreign sovereign is alleged to have expropriated property in violation

of international law, the foreign sovereign is amenable to suit in federal court. 28 U.S.C. §§ 1330(a), 1605(a).

A "presumption" of immunity that imposed an exceptionally heavy burden on plaintiffs bringing expropriation claims against foreign sovereigns would be contrary to the purposes of the Act. The FSIA was intended to bring certain claims into federal court just as much as it was intended to keep other claims out. *See* H.R. Rep. No. 94-1487, at 45 (Letter of Deputy Sec. of State Ingersoll and Deputy Attorney Gen. Tyler to the Speaker of the House) ("The broad purposes of this legislation" are to "facilitate . . . litigation against foreign states and to minimize irritation in foreign relations arising out of such litigation."); *1973 House Hearing* 29 (Testimony of Bruno Ristau, Chief of the Foreign Litig. Section, Civil Div., Dep't of Justice) ("[W]e would like to afford to our local citizens and entities who deal with foreign governments in the United States effective redress through the instrumentality of our courts.").

In a dispute over the scope and applicability of a FSIA exception, including a dispute relating to threshold jurisdictional requirements, the Court's inquiry is therefore limited to determining whether the exception applies according to traditional methods of statutory interpretation. No court has ever held that there is a "thumb on the immunity side of the scale" in conducting this basic interpretive inquiry, as Petitioners urge. Pet. Br. 17. To the contrary, this Court has declined to read extra "unexpressed requirement[s] into the FSIA's exceptions. *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992).

II. THE EXPROPRIATION EXCEPTION WAS DESIGNED TO ALLOW EXPROPRIATION CLAIMS TO BE HEARD ON THE MERITS IN FEDERAL COURT

A. Congress Enacted The Expropriation Exception To Provide An Adequate Remedy For A Serious Foreign Policy Concern

The FSIA's history does not support a narrow construction of the Act's pleading standards based upon the government's current articulation of its "reciprocal self interest." U.S. Br. 21. The FSIA represented the culmination of several decades of progress in the United States and the international community towards more formal mechanisms of dispute resolution between citizens and foreign states. At the time of the Tate Letter, the United States was among the last adherents to the "absolute" theory of sovereign immunity, along with the United Kingdom and "the Soviet Union and its satellites." *Alfred Dunhill*, 425 U.S. at 714 (Tate Letter). Meanwhile, there were "evidences that British authorities [were] aware of its deficiencies and ready for a change." *Ibid.* At the 1976 House hearing, in response to questioning from Representative Barbara Jordan as to whether "any states in the community of nations would be irritated by our codification of the restrictive theory," Legal Adviser Monroe Leigh responded that the FSIA represented the United States' effort to catch up to the international community by enacting the restrictive theory into law. *1976 House Hearing* 54.

The expropriation exception represented an effort to bring U.S. claims for compensation from foreign sovereigns, which had previously been at the mercy of diplomatic and political machinations, into a formal adjudicatory process. The enactment of the expropriation exception followed an epidemic of foreign expropriation of U.S. assets, especially in communist countries. H. Comm. on Foreign Affairs, 88th Cong., *Report on Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century* (Comm. Print 1963), 2 I.L.M. 1066, 1085 (1963) ("*Expropriation of American-Owned Property*") ("Since the end of the Second World War, the problem of expropriation has increased according to almost any measure. Expropriations have become more frequent; more countries have undertaken them; more American property holders have been affected. The most widespread expropriations have occurred in the countries which adopted communism.").

Cuban expropriation of U.S. property following Fidel Castro's revolution is an instructive example of the scope of the problem and the U.S government's attempts to respond. By 1963, Castro's four year-old government had expropriated "all but a relatively small amount of U.S. owned property" in Cuba. *Ibid.* As the Cuban government took increasingly aggressive steps to expropriate Americans' property, the U.S. government struggled to mount an effective response. On the same day that Cuba enacted a law "authoriz[ing] the nationalization of U.S.-owned property generally," for example, the United States retaliated by reducing its quota for importing Cuban sugar by 700,000 tons. *Id.* at 1086. The

United States cut off diplomatic relations with Cuba in 1961, and in July 1963, froze $30 million dollars of Cuban assets in the United States. *Ibid.* As of 1963, Americans had lost $1.3 billion in assets to Cuban expropriation, for which "no compensation was made in any instance." *Ibid.* These losses were equivalent to over $10 billion in 2016 dollars. *See* Bureau of Labor Statistics, *BLS Inflation Calculator*, http://www.bls.gov/data/inflation_calculator.htm.

In the years immediately preceding the FSIA's enactment, both Congress and the Executive Branch adopted measures to penalize foreign sovereigns who expropriated U.S.-owned property without just compensation. *See* Resp. Br. 34-36. Of particular relevance here, in 1972—the year before the Executive Branch began drafting the bill that would become the FSIA—the White House issued a formal policy statement announcing a series of retaliatory measures against foreign sovereigns that "expropriate[] a significant U.S. interest without making reasonable provision for [prompt, adequate, and effective] compensation." White House Press Release, *U.S. Statement on Economic Assistance and Investment in Developing Nations* (Jan. 19, 1972), 11 I.L.M. 239, 241 (1972).

Diplomatic retaliation could deter, but not repair, losses suffered to foreign expropriation. The inadequacy of diplomatic solutions, when combined with the limited remedies available to American citizens to recover expropriated assets in any court, made the need for a legislative solution apparent. *See, e.g.*, Ronald Mok, *Expropriation Claims in United States Courts: The Act of State Doctrine, The Sovereign Immunity Doctrine, and the Foreign*

Sovereign Immunities Act, 8 Pace Int'l L. Rev. 199, 217 (1996) ("Collectively, the Cuban expropriation cases led to the enactment of the FSIA."). The FSIA was predicated on an understanding that despite their diplomatic sensitivity, expropriation claims ought to be resolved according to settled legal principles rather than political negotiations. The Act's proponents emphasized that even "a successful plea of sovereign immunity interposed by a State does not terminate the claim. Rather, the claim is merely transferred to the diplomatic arena which is ill suited for the settlement of private-law or commercial disputes." *1976 House Hearing* 31 (Testimony of Bruno A. Ristau, Chief of the Foreign Litig. Section, Civil Div., Dep't of Justice).

The FSIA formalized the United States' decision to promote the resolution of expropriation claims against foreign sovereigns in the courts, rather than in the political or diplomatic arena. As such, the inclusion of the expropriation exception in the draft FSIA is best understood as a mechanism *for effectuating* reciprocity between the United States and expropriating nations such as Venezuela. *See 1973 House Hearing* 29 (Testimony of Bruno A. Ristau, Chief of the Foreign Litig. Section, Civil Div., Dep't of Justice) ("[A]s a partial answer to" an "earlier question, as to what effect this proposed legislation would have in the converse situation, when the United States or one of its agencies appears as a litigant abroad, I would suggest that the affect we attempt to bring about in the United States is really the reverse. We would like, based on our experience as a litigant abroad to subsume to the jurisdiction of our domestic courts

foreign governments and foreign entities . to the same extent that the U.S. Government is already at the present time subject to the jurisdiction of foreign courts "). The Brief of the United States is therefore mistaken when it asserts, without citation to the relevant history, that "Congress would have wanted to avoid" any construction of the FSIA that would give to rise to reciprocity concerns. U.S. Br. 22. Faithful adherence to the concerns of Congress and the Executive Branch for achieving reciprocity in the face of widespread foreign expropriation of U.S.-owned property requires full and fair application of the FSIA's statutory text.

B. Petitioners' Heightened Threshold Requirements Would Frustrate The Purposes Of The FSIA

Petitioners' plea that jurisdiction under the FSIA be held to a heightened pleading standard has no basis in the statute's text, structure, or enactment history. According to Petitioners, in order for a court to have jurisdiction over claims under the FSIA, "[a] plaintiff must plead facts that, if taken as true, establish the existence of all of the elements set out in the relevant statutory exception." Pet Br. 15. With respect to the expropriation exception in particular, Petitioners ask this Court to require plaintiffs to plead allegations that conclusively establish that "the rights claimed to be 'in issue' in the complaint actually *are* 'rights taken in violation of international law.'" *Ibid.* (quoting 28 U.S.C. § 1605(a)(3)). In other words, before taking jurisdiction of an expropriation claim, a court would have to be certain that the facts alleged "actually"

made out a violation of international law. Yet in the very cases that Congress intended the expropriation exception to cover, the question whether a defendant violated international law is to be decided on the merits by the federal courts. Congress never intended what Petitioners advocate: that the federal courts would lack jurisdiction to hear expropriation claims unless it was established at the outset that the alleged expropriation violated international law.

In essence, Petitioners seek to import the pleading standard for stating a substantive claim for relief under Rule 12(b)(6) into the threshold jurisdictional determination. *Compare* Fed. R. Civ. P 12(b)(1) (permitting dismissal for "lack of subject-matter jurisdiction") *with* Fed. R. Civ. P 12(b)(6) (permitting dismissal for "failure to state a claim upon which relief can be granted"). This Court has repeatedly admonished that it is "a threshold error" to confuse the issue of subject-matter jurisdiction, which "refers to a tribunal's power to a hear a case" with "what conduct [a statute] reaches ., which is a merits question." *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (determining, as a matter of law, that "the extraterritorial reach of § 10(b) [of the Securities and Exchange Act of 1934]" is a merits question properly considered under Rule 12(b)(6)); *see also* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 2016) ("a motion under Rule 12(b)(1) [should not] be confused with a motion under Rule 12(b)(6) to dismiss for failure to state a claim for relief under federal or state law because the two are analytically different; as many courts have

observed, the former determines whether the plaintiff has a right to be in the particular court and the latter is an adjudication as to whether a cognizable legal claim has been stated").

Petitioners' desired standard misapprehends Congress's purpose in creating the expropriation exception, which was to empower federal courts to decide *whether* a foreign sovereign's taking has violated international law. The text of the exception provides no indication, let alone any direction, that courts are required to make an initial determination—without the aid of a developed factual record—that a particular foreign state's conduct violated international law before it may exercise jurisdiction over a plaintiff's claim. Requiring so abbreviated a procedure would be inconsistent with the role of the federal courts as authoritative interpreters of international law. *See The Paquette Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law."); Memorandum of the United States as *Amicus Curiae* 25 n.49, *Filartiga* v. *Pena-Irala*, No. 79-6090, 1980 WL 340146 (2d Cir. 1980) ("Customary international law is federal law, to be enunciated authoritatively by the federal courts.").

The threshold inquiry for determining whether a federal court has subject matter jurisdiction is well established. As this Court reaffirmed in 1974—while Congress was considering the draft version of the FSIA—"[o]nce a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not insubstantial on their face, no further consideration of the merits of the claim[s] is relevant to a determination of the court's jurisdiction of the subject matter." *Hagans* v.

Lavine, 415 U.S. 528, 542 n.10 (1974) (citations and internal quotation marks omitted). In *Hagans* itself, this Court observed that the plaintiff's "reasoning . . . may ultimately prove correct, but it is not immediately obvious from the decided cases or so very plain under the Equal Protection Clause." *Id.* at 542 (internal quotation marks omitted). Despite the Court's uncertainty as to the *legal sufficiency* of the plaintiff's jurisdictional claim, it held that federal jurisdiction was proper without "further consideration of the merits." *Id.* at 542 n.10. There is nothing in the text or enactment history of the FSIA to indicate that Congress intended to depart from this well settled standard.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

MICHAEL J. GOTTLIEB
Counsel of Record
RYAN Y. PARK
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Suite 800
Washington, DC 20015
(202) 237-2727
mgottlieb@bsfllp.com

October 3, 2016